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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. **958**

MARCOS PEREZ JIMENEZ, *Petitioner,*

v.

GUY W. HIXON, United States Marshal, Southern District of Florida, Miami, Division,

and

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, Miami, Florida, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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March 28, 1963

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MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, Miami, Florida, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Marcos Perez Jimenez, petitioner herein, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered on December 12, 1962.[1]

[1] The respondent Guy W. Hixon is the successor in office, as United States Marshal, to John E. Maguire, named in the caption of the case below. The respondent Manuel Aristeguieta, who had filed the original extradition complaint on behalf of the Venezuelan Government, was permitted to intervene in the habeas corpus proceedings in the District Court and was an appellee before the Court of Appeals below. See Tr. 61.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals dated December 12, 1962, as to which review is sought, is reported at 311 F. 2d 547 and is reprinted in Appendix A hereto, p. 1a, *infra*.

The determinations and order entered on August 23, 1961, by the District Court for the Southern District of Florida, dismissing the petitions for habeas corpus and discharging the orders to show cause, are not reported but are reprinted as Appendix B hereto, p. 29a, *infra*.

The order of commitment in the extradition proceedings dated June 16, 1961, the certification to the Secretary of State dated June 23, 1961, and the certification of evidence to the Secretary of State dated June 23, 1961, all signed and entered by United States District Judge George W. Whitehurst, are unreported; they are reprinted as Appendix C hereto, p. 34a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on December 12, 1962. On March 8, 1963, the Chief Justice of the United States signed an order extending the time for filing this petition to and including March 29, 1963. The jurisdicion of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a Judge of a United States District Court, an Article III tribunal, may constitutionally be invested with jurisdiction, purportedly given by 18 U.S.C. § 3184, to certify to the Secretary of State whether an accused individual is subject to extradition pursuant to a treaty with a foreign government.

2. Whether the alleged financial crimes of a former head of a foreign government, stated to have involved personal financial gain and an "abuse of his office" at a time when he was "charged with responsibility for the administration of public funds, property and contracting authority" in the foreign government, constitute crimes or offenses of a political character, or acts connected with such crimes or offenses, within the meaning of Art. III of the Treaty of Extradition between the United States and Venezuela, 43 Stat. 1698.

3. Whether a Judge of the United States District Court for the Southern District of California, assigned to "hold a District Court" in the Southern District of Florida, can entertain and hold hearings on an extradition complaint, filed before him pursuant to 18 U.S.C. § 3184 after the expiration of the period of such assignment.

4. Whether it is consistent with procedural due process requirements, under either the Fifth Amendment or 18 U.S.C. § 3184, for the extradition magistrate to refuse to read all the demanding government's evidence submitted earlier to a magistrate previously assigned to the case and to rely instead on a fact memorandum prepared by counsel for the demanding foreign government.

CONSTITUTIONAL, STATUTORY AND TREATY PROVISIONS INVOLVED

Constitution of the United States, Article III:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . .

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies to which the United States shall be a Party;—to Controversies between two or more States; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

United States Code, Title 18:

§ 3184. Fugitives from foreign country to United States.

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If on such hearing, he deems the evidence sufficient to sustain the charge under the provisions

of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such persons, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

---

§3186. Secretary of State to surrender fugitive

The Secretary of State may order the person committed under sections 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged . . . .

Extradition Treaty between the United States and Venezuela, 43 Stat. 1698 (1922):

* * * *

Article II

In accordance with the provisions of this Convention, the persons shall be delivered who shall have been charged with or convicted of any of the following crimes:

* * * *

14. Embezzlement or criminal malversation committed within the jurisdiction of one of the parties by public officers or depositaries, where the amount embezzled exceeds 200 dollars in the United States of America or B. 1,000 in the United States of Venezuela.

* * * *

18. Obtaining money, valuable securities or other property by false pretenses or receiving any money, valuable securities or other property knowing the same to have been unlawfully obtained, where the amount of money or the value of the property so obtained or received exceeds 200 dollars in the United States of America or B. 1,000 in the United States of Venezuela.

* * * *

20. Fraud or breach of trust by a bailee, banker, agent, factor, trustee, executor, administration, guardian, director, or officer of any company or corporation, or by any one in any fiduciary position, where the amount of money or the value of the property misappropriated exceeds 200 dollars in the United States of America or B. 1,000 in the United States of Venezuela.

* * * * *

Article III

The provisions of this Convention shall not import claim of extradition for any crime or offense of a political character, nor for acts connected with such crimes or offenses; and no person surrendered by or to either of the Contracting Parties in virtue of this Convention shall be tried or punished for a political crime or offense. When the offense charged comprises the act either of murder or assassination or of poisoning, either consummated or attempted, the fact that the offense was committed or attempted against the life of the sovereign or head of a foreign state or against the life of any member of his family, shall not be deemed sufficient to sustain that such a crime or offense was of a political character, or was an act connected with crimes or offenses of a political character.

STATEMENT OF THE CASE

The record in this habeas corpus case is voluminous, comprising 16 volumes and 4742 pages exclusive of the proceedings in the Court of Appeals. Included in that record are all the relevant portions of the earlier extradition hearings. For present purposes, the following summary may be made of the relevant facts:

A. The Background Facts

1. Marcos Perez Jimenez, the petitioner herein, served as Provisional President of the Republic of Venezuela from December 2, 1952, to April 19, 1953, and as President of that Republic from April 19, 1953, until January 23, 1958. During those years he exercised sovereignty over the national affairs of the Republic of Venezuela; as stated in the extradition complaint (Tr. 857), "he alone had responsibility for administering the public affairs of the Republic." On January 23, 1958, the Government headed by the petitioner was overthrown by violent revolutionary means, and the Accion Democratica Party, under the leadership of the present President of Venezuela, was returned to power.[2]

2. A long-standing political and personal enmity exists between the petitioner and Romulo Betancourt and their respective political forces. In 1945, the Accion Democratica with the aid of the military success-

[2] "The Communists joined in the revolution against Perez Jimenez, not because of any dislike of dictatorship but only because they wanted to become the dictators." Former Vice President Nixon, *Six Crises* (1962), p. 223. See also Statement of Deputy Under Secretary Murphy, Dept. of State Bulletin, June 9, 1958 (Tr. 4631-2), referring to the "rapid return of the Communists to Venezuela from exile and their intense activity . . . following the overthrow of Perez Jimenez."

fully overthrew the then Government of Venezuela and a "seven-man revolutionary junta, headed by Socialist Leader Romulo Betancourt, and including civilian and military leaders of the movement, was established". Tr. 4326. Betancourt became President in 1948. Some time thereafter the Communist Party was legally recognized. The Betancourt Government was in turn overthrown by a bloodless military coup in 1950. A new military junta, which included the petitioner as Defense Minister, assumed power. Betancourt fled into exile, and the Accion Democratica in a coalition pact with the Communist Party commenced agitation, unrest and violence in an effort to regain power. Tr. 3102-3105, 3659, 4242. Following a series of revolutionary and terroristic plots by these elements, all of which were foiled by the provisional junta Government, elections were held in 1952 and the petitioner became Provisional President and then President of Venezuela.

After the overthrow of petitioner's Government in January, 1958, petitioner and his family were forced to flee Venezuela in fear of their lives. Their property and belongings left behind were seized, burned, or destroyed. Petitioner and his family sought and obtained political asylum in the United States,[3] remaining virtually unmolested until petitioner was arrested

[3] Former Vice-President Nixon, in his book *Six Crises* (1962), p. 211, has written:

> "Perez Jiñenez, who was probably the most hated dictator in all of Latin America, had fled with his despised Chief of Secret Police, Pedro Estrada, to exile in the United States.
>
> "Our government, which does not believe that deposed rulers, no matter how despicable, should be put before firing squads without trial, granted the men sanctuary."

See also Jorge Maldonado Parilli, *Yo Luche Contra El Delito*, published in Spain in 1962, pp. 325, 330, 340, 348, detailing the events relative to petitioner's entry into the United States.

on August 25, 1959, in connection with the extradition proceedings.

B. The Extradition Proceedings

3. On July 23, 1959, the Attorney General of Venezuela preferred charges against the petitioner Jimenez in the Federal Court of Venezuela, the highest court in that Republic and now known as the Supreme Court of Justice. Tr. 1092. Three categories of crimes under the Venezuelan Penal Code were charged:

(a) Crimes against public property, consisting of embezzlement, extortion, corruption of public officers, abuse of authority and breach of his official duty;

(b) Crimes against liberty and against persons, committed "during the administration which was headed by the accused which, it is stated, under his leadership became one of the most terrible dictatorships," consisting of connivance in the murders of several public figures; and

(c) Crimes against public trust and against the state, consisting of election fraud in the national elections held on November 30, 1952, the results of which were "greatly falsified."

On July 30, 1959, the Federal Court of Venezuela, after considering evidence submitted in support of these charges, ruled that under the Venezuelan Penal Code "well-founded indications appear of the defendant's guilt of the crimes with which he is charged." Tr. 1131. And since crimes "against the State of a political nature" had been charged, the Federal Court held itself bound by Venezuelan law "to continue consideration of the charges until final judgment." Tr. 1132.

On August 12, 1952, the Federal Court of Venezuela issued a warrant for petitioner's arrest; and on the

following day it determined that extradition of the petitioner should be requested of the United States. Tr. 1074, 1075. The political crimes in the nature of electoral frauds were omitted from the bill of particulars in the request.

4. On August 24, 1959, following a formal request for extradition presented to the State Department by the Venezuelan Ambassador, the respondent Aristeguieta filed in the United States District Court for the Southern District of Florida[4] a complaint on behalf of the Government of Venezuela for the extradition of the petitioner pursuant to 18 U.S.C. § 3184. Tr. 459. The complaint prayed "that this Honorable Court issue its warrant for the preliminary or provisional apprehension and detention of the said defendant so charged, so that he may be brought before this Court or Commissioner to the end that the evidence of criminality may be heard and considered, and that he may be extradited to the Republic of Venezuela for the reasons herein alleged." Tr. 461. The complaint was sworn to before Judge Joseph Lieb, a Judge of the United States District Court at Miami, Florida. Tr. 461. Judge Lieb thereupon issued a warrant of arrest, ordering petitioner brought before him for a hearing in accordance with law and the Extradition Treaty with Venezuela. Tr. 462.

5. Petitioner was arrested on August 25, 1959, and released on bond in the amount of $25,000 by Judge

[4] The complaint, which was filed with the Clerk of the District Court, was captioned "In the District Court of the United States for the Southern District of Florida, Miami Division," and labeled Manuel Aristeguieta as the plaintiff and Marcos Perez Jimenez as the defendant. The Clerk assigned the following number to the complaint and to the case: No. 9425-M-Civil. All subsequent pleadings, motions, papers, orders and certifications bore that caption and number.

Emmet C. Choate, another Judge of the District Court at Miami. Tr. 463.

6. Petitioner thereupon filed a motion to quash the arrest warrant. Tr. 464. This motion came on for hearing before Judge William C. Mathes, a Judge of the United States District Court for the Southern District of California. At the time, Judge Mathes was assigned and designated by the Chief Justice of the United States to "hold a District Court" in the Southern District of Florida. A series of such assignments of Judge Mathes had been made, the last of which was effective "during the period beginning February 1, 1960, and ending February 29, 1960, and for such further time as may be required to complete unfinished business." Tr. 2793-2794. No additional assignment of Judge Mathes was ever made.

7. After a hearing, Judge Mathes on September 24, 1959, quashed the original warrant of arrest for failure to meet legal requirements, granted permission for the filing of an amended complaint and issued a new warrant of arrest on the basis of the amended complaint. Tr. 577-581. Petitioner's bond was continued as previously posted. Tr. 581. Subsequently, on November 23, 1959, Judge Mathes permitted the Venezuelan Government to file two more amendments to the complaint. Tr. 591.

8. Following a series of continuances, Judge Mathes on March 9, 1960 — after the period of his last assignment to the District Court for the Southern District of Florida had expired — permitted the filing of the second amended complaint, reflecting a response to petitioner's challenges to the legality of the earlier amended complaint. See Tr. 851-886. This second amended complaint became the basis for the ensuing

extradition hearing and the ultimate certification to the Secretary of State by the District Court. In substance, it charged that petitioner, during the period when he was President of Venezuela and legally responsible for the administration of the funds and contracting authority of Venezuela, had committed two distinct groups of crimes:

(a) Four charges of murder and participation in murder as an accessory before the fact. These charges were subsequently found unsupported by any evidence of probable cause and are no longer in issue.[5]

(b) Some fifteen charges of financial crimes resulting in alleged private personal gain, growing out of an "abuse of his office" (Tr. 870) relative to alleged commissions or kick-backs on government contracts, alleged securing of part of the compensation paid for land expropriated by the Venezuelan Government, alleged participation in compensation paid on construction contracts, and alleged improvements on and maintenance of his private estate at public expense.

9. Immediately upon the filing of the foregoing second amended complaint,[6] a second warrant of arrest

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[5] Judge Whitehurst stated in this connection at the hearing on June 23, 1961 (Tr. 4305): "There was a political overtone there, but I don't think that the evidence actually ever sufficiently connected the defendant with the murders."

[6] The court stated (Tr. 835): "The motion for leave to file the plaintiff's second amended Complaint will be granted upon the plaintiff verifying the Complaint heretofore lodged with the Clerk of the Court." Following the oral verification before the court, the clerk was ordered (Tr. 838) to "file the plaintiff's second amended Complaint and the warrant for the issuance thereof." Judge Mathes, in his capacity as United States District Judge, also signed the attestation appearing at the end of the second amended complaint. Tr. 886-887.

was issued requiring petitioner to be brought forthwith "before me [Judge Mathes] so that he may be dealt with according to law and pursuant to the provisions of the aforesaid treaty." Tr. 889. Once again petitioner's $25,000 bond was continued over the protests of the Venezuelan Government.

10. On May 8, 1960, following the lodging on April 12 of twelve volumes of evidence, the Venezuelan Government offered its evidence before Judge Mathes to support the charges in the second amended complaint. On May 10, two days later, an order was entered denying petitioner's motion to dismiss that complaint for insufficiency of supporting evidence. Tr. 1071.

11. After further continuance, Judge Mathes on September 21, 1960, entered an order:

(a) Permitting the filing of written memoranda in support of and in opposition to certain motions submitted by petitioner relating to the taking of depositions and inspecting documents. These memoranda were to be filed by November 21, 1960, and it was agreed by the parties "that such motions may be ruled on by the Court without further oral hearing and that an order thereon may be entered by the Court whether or not the Court is sitting in Miami, Florida at the time." Tr. 2792.

(b) Setting further proceedings herein "for December 12, 1960, at 10 o'clock A.M., at which time both the defendant and the plaintiff shall be personally present before this Court; such further proceedings shall be for the purpose of taking the oral testimony on behalf of the defendant and for such other matters as may be appropriate." Tr. 2792.

12. Before Judge Mathes could hold any hearings or enter any orders as contemplated by his order of

September 10, 1960, the Judicial Council of the Fifth Circuit on October 7, 1960, entered the following order (Tr. 2793-2794):

> "In December 1959, the Chief Justice of the United States designated Honorable William C. Mathes, United States District Judge for the Southern District of California, to hold a district court in the Southern District of Florida 'during the period beginning February 1, 1960, and ending February 29, 1960, and for such further time as may be required to complete unfinished business.'
>
> "In view of the time which has elapsed since February 29, 1960, to avoid doubt as to jurisdiction or power to act, and to provide for the effective administration of the business of said district court for the Southern District of Florida is now
>
> "ORDERED by the Judicial Council of the Fifth Circuit that any matters which might be considered 'unfinished business' still being or contemplated to be heard or considered by Judge Mathes under such designation shall be assigned to some other judge . . ."

No specific reference was made in this order to the instant extradition matter then being heard by Judge Mathes.

13. On October 31, 1960, Judge Mathes addressed a letter to Judge Choate in which he called attention to the pending motions and other pertinent matters in the instant proceeding. Tr. 2796-2798. A handwritten postscript was appended to the letter, reading:

> "P.S. It is an open question, I suppose, once this extradiction proceeding comes before another magistrate, whether the entire taking of the 'evidence of criminality' (18 U.S.C. § 3184) must be begun anew." Tr. 2798.

14. On November 17, 1960, Judge Choate wrote to respective counsel, advising them of the directive that Judge Mathes "be relieved of any further duties as respects to cases pending in the Southern District of Florida, and that the above [extradition] case be assigned to some other judge." Tr. 2902. He further advised that "the present condition of the calendars in the Miami Division" was such that it would be "sometime in 1961 before this case can be given the time and attention it will require." *Id.* Subsequently, on March 6, 1961, Chief Judge George W. Whitehurst of the Southern District of Florida ordered that this case be assigned to himself. Tr. 2924-2925. He thereupon set a pretrial conference for March 21, 1961, and a hearing on that date on all pending motions. Tr. 2925. No complaint was filed before Judge Whitehurst, nor was a new warrant of arrest issued by him. Judge Whitehurst proceeded on the basis of the second amended complaint filed before Judge Mathes and the warrant previously issued by and returnable to Judge Mathes.

15. Judge Whitehurst thereafter scheduled and held hearings on various other procedural motions. At the hearing on March 21, 1961, petitioner's counsel insisted that to rule intelligently on the issues Judge Whitehurst would have to read all the documentary and other evidence submitted to Judge Mathes by the Venezuelan Government. Judge Whitehurst apparently acquiesced, stating (Tr. 2992):

> "I am going to try to examine all of this record in that length of time. I hope to become as familiar with it as I can. I certainly would welcome the concerted assistance of counsel by distilling the facts, the evidence, but apparently you are not going to agree to that; so I am going to go through this record myself, I presume."

Counsel for the Venezuelan Government then called the Judge's attention to a "fact memorandum" that had been submitted to Judge Mathes along with the documentary evidence. That memorandum purported to summarize "the whole matter" respecting the alleged crimes as detailed in the voluminous documents. Judge Whitehurst stated that it would be "of considerable aid to the Court," with the understanding that it was just "your view of your case." Tr. 2993-2995. Although it was pointed out to Judge Whitehurst that counsel for petitioner had previously submitted to Judge Mathes a somewhat similar memorandum in support of the motion to dismiss the complaint, Judge Whitehurst indicated that he did not desire to see or read that memorandum since "Judge Mathes has already passed on that motion" and he further stated that "I would rather have the plaintiff's [Aristeguieta's] statement of his own case." Tr. 2996.

16. After hearing testimony on petitioner's behalf, receiving various documentary exhibits and later considering closing arguments, Judge Whitehurst on June 16, 1961, concluded that "the evidence overwhelmingly establishes probable cause to believe the defendant guilty of an illicit self-enrichment, by whatever name, either embezzlement, breach of trust, malversation, any one of the three would certainly comprehend that." Tr. 4253-4254. He further concluded that the evidence was insufficient to "establish probable cause or complicity in an unlawful homicide." Tr. 4254. With respect to the political character of the financial crimes, Judge Whitehurst stated (Tr. 4305):

> "I don't think they are. I don't think they have a thing to do with the political character, unless the fact that the evidence shows that the defendant

held the office of President and had directly or indirectly participated in the receipt of money which he should not have received in good faith, unless his mere holding of the office would contribute to the political ingredient, I don't think there is anything in that."

He thereupon signed an order of commitment, committing petitioner to the custody of the United States Marshal to await the action of the Secretary of State under 18 U.S.C. § 3186. See Appendix C, p. 34a, *infra*.

17. On June 23, 1961, Judge Whitehurst signed and entered a "Certification to the Secretary of State" in accordance with 18 U.S.C. § 3184. See Appendix C hereto, pp. 34a-39a, *infra*. He therein certified, "upon consideration of all of the evidence submitted, the pleadings of the parties; the arguments of counsel, written and oral, and the orders heretofore entered herein," that he deemed the evidence "sufficient to sustain the charges hereinafter specified made against the defendant, Marcos Perez Jimenez, under the provisions of the Treaty of Extradition between the United States and the Republic of Venezuela, 43 Stat. 1698." Various findings and conclusions were made in the certification, among which were:

(a) The evidence submitted was found "insufficient" to sustain the charges that petitioner was guilty of murder and of participation in murder as an accessory before the fact. Paragraph 10 of certification.

(b) The evidence submitted did sustain each of the alleged financial crimes within the intendment of Secs. 14, 18 and 20 of Article II of the Treaty "according to the probable cause standard contemplated by 18 U.S.C.

§ 3184 and Article I of the aforesaid Treaty." Paragraph 12 of certification. These crimes were found to have occurred during periods when, as President of Venezuela, petitioner "was charged with responsibility for the administration of public funds, property and contracting authority in the Government of the Republic of Venezuela." Paragraph 12 of certification.

(c) Each of the aforesaid financial crimes was found to be "for the private financial benefit of the defendant and is not a crime or offense of the political character or an act or acts connected therewith," within the scope of Article III of the Treaty. Paragraph 13 (a) of certification.

18. The Clerk of the District Court was directed by Judge Whitehurst to transmit the foregoing Certification to the Secretary of State forthwith. See p. 38a, *infra*. Simultaneously, Judge Whitehurst signed a separate document, entitled Certification of Evidence to the Secretary of State, certifying the entire record in the extradition proceeding and directing the Clerk to transmit that certified record to the Secretary of State. Appendix C hereto, p. 39a, *infra*.

19. During the course of an informal hearing in Judge Whitehurst's chambers on June 23, 1961—and before he signed the aforesaid Certification to the Secretary of State—Judge Whitehurst indicated that he had not, in fact, read the evidence presented earlier to Judge Mathes, but had relied instead on representations made by counsel for the Venezuelan Government as to the contents of that evidence. Those representations were contained in the "fact memorandum" submitted to Judge Mathes along with the voluminous documentary evidence, a memorandum called to Judge

Whitehurst's attention on March 21, 1961, by the Venezuelan Government's counsel. See Paragraph 45 of this Statement of the Case, *supra*. At the June 23 informal hearing the following colloquy took place (Tr. 4293-4):

> Mr. Walters: The point is: Does that conform with the proposition that you have read all of the evidence in connection with this?
>
> The Court: No. I haven't read all of the evidence. I simply took the counsel's analysis of the evidence.
>
> Mr. Walters: Then, your Honor, it doesn't seem—
>
> The Court: How did Judge Mathes arrive at an opinion about it at the close of plaintiff's case? Did he do that by summation of counsel?
>
> Mr. Walters: Yes, but he read all the evidence.
>
> The Court: Of course, he heard the evidence, he was the trial judge.
>
> * * * * *
>
> The Court: I have carefully read the fact memorandum,[7] the same that was presented to Judge Mathes. That is one difficulty in this case; the taking over of a case always presents a difficulty, and that seldom has to be faced.

C. The Habeas Corpus Proceedings

20. In the meantime, prior to the completion of the extradition proceedings, petitioner on April 10, 1961, had filed in the United States District Court at Miami, Florida, a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241, challenging the jurisdiction to try petitioner in the extradition proceedings. Tr.

[7] This was a plain reference to the fact memorandum submitted by counsel for the Venezuelan Government, the only memorandum Judge Whitehurst wanted to see or consider. See Paragraph 15 of this Statement of the Case, *supra*.

2. Judge Sweeney of that court issued an order to show cause. On April 17, 1961, Judge McRae of that court, before whom the show cause order came on for hearing, indicated a reluctance to act while the extradition proceedings were still pending. The matter was accordingly continued.

21. On June 28, 1961, following the completion of the extradition proceedings, petitioner filed an amendment to his habeas corpus petition. The petition was thereby expanded to include not only the claim that the Act of State doctrine precluded extradition but also the claims that the extradition magistrate did not have jurisdiction, that the alleged crimes did not fall within the provisions of the Treaty of Extradition, that Judge Whitehurst's decision was not based on competent evidence, and that petitioner had not been afforded due process of law in the extradition proceedings. Tr. 63. Judge McRae, upon a reading of the amended petition, ordered the respondent marshal to show cause, if any, why the writ of habeas corpus should not issue. Tr. 80.

22. Answers, responses and traverses were duly filed by the respective parties, and the Venezuelan Government, through the respondent Consul General, was allowed to intervene. On August 22, 1961, the matter came on for hearing before Judge McRae. At that time, he limited the scope of review, under the authority of *Fernandez v. Phillips*, 268 U.S. 311, to the following elements: (a) whether the magistrate had jurisdiction, (b) whether the offenses charged were within the Treaty, and (c) whether there was any evidence warranting the finding that there was reasonable ground to believe the petitioner guilty. Tr. 132, 240.

23. Following the hearing, Judge McRae on August 23, 1961, concluded that the original and amended petitions for habeas corpus should be dismissed and the respective orders to show cause should be discharged. Tr. 241; see Appendix B hereto, p. 29a, *infra*. A previous $25,000 bond, under which petitioner had been released pending the habeas corpus proceedings, was revoked and canceled; but petitioner's request for continued enlargement on bail was granted over the protests of the Venezuelan Government, "until further order of Court" upon the posting of a $100,000 bond. Tr. 241. See Appendix B hereto, p. 32a, *infra*.

24. On December 12, 1962, the Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court dismissing the habeas corpus petitions and discharging the orders to show cause. See Appendix A hereto, p. 1a, *infra*. That court held *inter alia*:

(a) A judge of a constitutional or Article III court, such as the United States District Court, can constitutionally be authorized to act as an extradition magistrate under 18 U.S.C. § 3184;

(b) The action of the Judicial Council for the Fifth Circuit in reassigning the uncompleted extradition proceeding pending before Judge Mathes was part of "the business of the courts" over which the Council has jurisdiction pursuant to 28 U.S.C. § 332;

(c) The alleged financial crimes charged to petitioner, occurring when, as President, he had "legal responsibility for the administration of the funds and contracting authority of Venezuela," were not encompassed within the Act of State Doctrine since they were found to have been committed for petitioner's "private financial benefit";

(d) Judge Whitehurst's decision that the financial crimes were not political crimes within the meaning of the Treaty of Extradition "was based upon the evidence and is not reviewable here"; and

(e) Although Judge Whitehurst conceded that he hadn't read all the evidence but "simply took counsel's analysis of the evidence," his certification to the Secretary of State "upon consideration of all of the evidence submitted, the pleadings of the parties, the arguments of counsel, written and oral, and the orders heretofore entered herein" plus a "realistic" view of his conduct in the proceedings compels the conclusion that he examined and considered the evidence as required by the Treaty and § 3184.

D. The Collateral Proceedings

25. During the course of the extradition proceedings before Judge Mathes, the Republic of Venezuela sought to subpoena certain bank records in New York in order to use the records as evidence in support of the charges contained in the second amended complaint. This effort proved unsuccessful and the matters are now pending in two cases before this Court following the grant of certiorari. 365 U.S. 840.

26. The first case now before this Court, *Aristeguieta v. First National City Bank*, No. 1, Oct. Term, 1962, stemmed from subpoenas duces tecum signed by Judge Mathes and served upon officials of banks in New York and New Orleans. The banks and depositors, who had moved to quash, appealed to the Court of Appeals for the Fifth Circuit, urging lack of power in the District Court or the District Judge to issue a subpoena in an extradition case on behalf of the demanding government. The Fifth Circuit held in favor of the banks

and depositors, and the subpoenas were ordered quashed. *Aristeguieta* v. *Jimenez*, 274 F. 2d 206 (C.A. 5). Certiorari was granted by this Court on March 20, 1961. 365 U.S. 840. The first and primary issue thereby accepted for review was stated to be (petition, p. 2):

> "In an extradition proceeding pursuant to the Treaty of Extradition between the United States and Venezuela, 43 Stat. 1698, and pursuant to 18 U.S.C. § 3184, has a United States District Judge conducting the proceeding, or the United States District Court in which he sits, the power to issue a subpoena duces tecum in aid of the proceeding?"

27. The second case presently before this Court, also captioned *Aristeguieta* v. *First National City Bank*, No. 4, Oct. Term, 1962, arose out of an order signed by Judge Mathes permitting the Republic of Venezuela "to resort to the deposition procedure provided in Rules 26 and 45 and related provisions of the Federal Rules of Civil Procedure" with respect to the depositions of officers of three banks in New York. Subpoenas to the deponents were issued by the Clerk of the United States District Court for the Southern District of New York. Motions to quash the subpoenas were filed and overruled by Judge Ryan of the Southern District of New York. The Court of Appeals for the Second Circuit reversed and ordered the subpoenas quashed. *First National City Bank* v. *Aristeguieta*, 287 F. 2d 219 (C.A. 2). Certiorari was granted by this Court on March 20, 1961. 365 U.S. 840. The first and primary issue thereby accepted for review was stated to be (petition, p. 3):

> "In an extradition proceeding pursuant to the Treaty of Extradition between the United States

and Venezuela, 43 Stat. 1698, and pursuant to 18 U.S.C. §3184, has a district court or judge the power to issue compulsory process similar to that provided for in the Federal Rules of Civil Procedure, on the application of the demanding government, in order to secure material and relevant evidence?"

28. Further briefing and argument of the two foregoing cases have been postponed by this Court at the suggestion of the Venezuelan Government. Such postponement was proposed in the Reply Memorandum of Petitioner Respecting Mootness and Deferral of Consideration, Nos. 1 and 4, Oct. Term, 1962, "pending the outcome of the [instant] habeas corpus proceeding" (pp. 5-6). It was noted in that Memorandum (p. 3), with respect to the contention in the instant proceeding regarding the jurisdiction of the various judges in the extradition matter, that the premise asserted

> "... has a close kinship to certain of the arguments which have been advanced by the respondents in the cases here pending respecting the power of an extradition judge to issue or to approve the issuance of compulsory process to secure evidence for use in an extradition hearing."

Urging that until petitioner's habeas corpus appeal rights have been exhausted "it cannot be certain that he will fail" (p. 4), the Memorandum argued that were petitioner ultimately to prevail on the jurisdictional issue so as to require a new extradition hearing the pending cases "would at once become most lively" (p. 5). The contention thus was made (p. 5) that

> "... the very fact that the extradition defendant is now invoking an argument on the question of

the jurisdiction of the extradition judge which is so similar to one of the principal arguments made by the respondents in support of their contention that the extradition judge had no power to issue or approve the issuance of compulsory process gives added emphasis to the point made by the petitioner here that a sovereign nation, coming to these shores to seek extradition of an accused fugitive, should not be forced 'to relitigate the entire controversy from the beginning' should the habeas corpus proceeding result in renewal of the self-same extradition proceeding."

REASONS FOR GRANTING THE WRIT

This case raises questions of far-reaching significance warranting plenary consideration by this Court. Foremost in issue is the role the Constitution permits the federal judiciary to play in advising and aiding the Executive Department in the execution of its international extradition commitments. The limitations imposed by Article III on the exercise of the judicial power of the United States, when focused on the provisions of 18 U.S.C. §3184, create the gravest doubts about the validity of that statute in its use of federal judges. This constitutional issue, augmented by related procedural problems and enmeshed with questions presently pending before this Court,* would alone justify the grant of certiorari.

Equally important and equally meriting review is the question as to the proper definition of the "political offense" exception in Article III of the Treaty of Extradition between the United States and Venezuela. The meaning of that universal treaty term is of con-

* See Question 1 presented in *Argentieri* v. *First National City Bank*, Nos. 1 and 4, Oct. Term, 1962, certiorari granted, 365 U.S. 840.

timing concern in the administration of all our 65 international extradition treaties and our one multilateral convention.[9] Delineation of that concept in its application to an attempt to extradite a former head of state thus assumes an importance far beyond the interests of this particular petitioner. The uncertainty presently surrounding this matter is such as to necessitate resolution by this Court.

I. THE CONSTITUTIONAL ISSUE

The Court of Appeals *sua sponte* raised and decided the important question whether the Constitution permits a Judge of a United States District Court—a court established under Article III of the Constitution—to perform the functions of an extradition magistrate under 18 U.S.C. § 3184. See Appendix A, pp. 9a-10a, *infra*; 311 F. 2d at 555. Recognizing that this problem had not been raised, let alone decided, in any previous case, the court gave an affirmative answer.[10] In support of that result, the court cited only *In re Metzger*, 5 How. (46 U.S.) 176, involving an extradition proceeding before a federal district judge in chambers prior to the enactment of § 3184 and holding merely that his action in chambers was not reviewable in this Court.

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[9] See Note to 18 U.S.C. § 3181.

[10] The agreement of counsel at the argument that a District Judge may be so authorized is not significant. Mere consent of the parties to the exercise of jurisdiction, or agreement that jurisdiction exists, cannot by itself confer or determine jurisdiction. *Brown Shoe Co. v. United States*, 370 U.S. 294, 305; *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18.

A. The Non-Article III Nature of § 3184 Proceedings

At the threshold of this constitutional problem is the fact that international extradition proceedings encompassed by 18 U.S.C. § 3184 do not reflect the exercise of the judicial power of the United States as defined in Article III, Section 2, of the Constitution. That fact is obvious for several reasons:

(1) *No case or controversy.* As held in *Muskrat* v. *United States*, 219 U. S. 346, 356, a constitutional predicate to the exercise of federal judicial power is the submission of a "case" or "controversy" to an Article III court. Adverse parties must advance claims under the Constitution, laws or treaties of the United States; and the court must resolve those claims in an appropriate manner and render a judgment binding on the litigants. But none of those characteristics mark a § 3184 proceeding. No federal rights or duties are asserted or determined. No trial is conducted.[11] No resolution is made of the fugitive's guilt or innocence. See *Benson* v. *McMahon*, 127 U. S. 457. And no binding judgment is rendered.

The only determination made under § 3184 relates to the existence of probable cause to believe that the fugitive committed a crime mentioned in the extradition treaty. His defenses are extremely limited. And the demanding country can meet its probable cause burden in a procedural framework that gives to it

[11] "The extradition judge is not authorized to conduct a trial; he is simply empowered to hear and evaluate evidence and to decide whether there is reasonable basis for holding the accused to answer the charge of the foreign country." Memorandum for the United States as Amicus Curiae in support of petition for certiorari, No. 1, Oct. Term, 1962, p. 3. See also *Glucksman* v. *Henkel*, 221 U.S. 508, 512.

"advantages most uncommon to ordinary civil and criminal litigation"[12] under Article III.

(2) *Advisory opinion.* The result of a § 3184 proceeding is not a judgment or order in the judicial sense. If the magistrate deems the evidence sufficient under the probable cause standard, he is merely authorized to "certify the same, together with a copy of all the testimony taken before him, to the Secretary of State." § 3184. The Secretary of State may then take whatever action he deems fit, either accepting, amending or rejecting the magistrate's findings.[13] A more classic example of an advisory, non-judicial function is difficult to imagine. See *Muskrat* v. *United States*, 219 U.S. 346. A certification subject to review or reversal by an executive officer is the very antithesis of Article III judicial action. *Gordon* v. *United States*, 117 U.S. 697, 702; *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113-114.

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[12] *First National City Bank* v. *Aristeguieta*, 287 F. 2d 219, 226 (C.A. 2), now pending before this Court on grant of certiorari, No. 4, Oct. Term, 1962. The circumscribed nature of the fugitive's procedural and substantial rights in a § 3184 proceeding is indicated in *Glucksman* v. *Henkel*, 221 U.S. 508, 512; *In re Oteiza y Cortes*, 136 U.S. 330, 336; *Collins* v. *Loisel*, 259 U.S. 309; *Grin* v. *Shine*, 187 U.S. 181, 188-190; and *Charlton* v. *Kelly*, 229 U.S. 447, 459-460.

[13] "The Secretary of State is not bound to extradite as a result of a judicial certification . . . . such certification does not have the effect of an enforceable command." Memorandum of the United States as Amicus Curiae in support of petition for certiorari, No. 1, Oct. Term, 1962, pp. 3-4.

In the Rudewitz case, for example, the Secretary of State declined to accept the magistrate's finding that certain alleged crimes were not of a political nature; in the Secretary's view, the crimes were "clearly political in their nature." Case of Krishian Rudewitz, Note from Secretary of State Root to Russian Ambrassador Rosen, Jan. 26, 1906; quoted in IV Hackworth, International Law 49-50 (1942).

(3) *No appellate review.* Moreover, the certification issued under § 3184 is not reviewable by any higher court in the Article III judicial system. *Collins* v. *Miller*, 252 U. S. 364, 369; *Terlinden* v. *Ames*, 184 U. S. 270, 278. Except for the limited collateral inquiry available by habeas corpus, the certification and related orders are not cognizable in any Article III court.[14]

(4) *Limited use of judicial power.* The fact that a § 3184 proceeding involves the exercise of certain incidents of judicial power, such as the issuance of a warrant of arrest, the admission to bail and the evaluation of evidence, does not elevate it to Article III status. As was said by this Court in *United States* v. *Ferreira*, 13 How. (54 U.S.) 40, 48, and reiterated in *In re Kaine*, 14 How. (55 U.S.) 103, 119, with respect to a treaty claim proceeding before a federal judge whose determination was subject to review by the Secretary of the Treasury:

> "The powers conferred by Congress upon the judge as well as the Secretary, are, it is true, judicial in their nature, for judgment and discretion must be exercised by both of them . . . But it is not judicial in either case, in the sense in which judicial power is granted by the Constitution to the courts of the United States."

The short of it is, as stated by the Attorney General of the United States in 1843,[15] an extradition proceed-

[14] In this very proceeding, the Court of Appeals below previously held that it could not entertain an appeal from any kind of order, interlocutory or final, made by the magistrate in the § 3184 hearing. *Jimenez* v. *Aristeguieta*, 290 F. 2d 196 (C. A. 5).

[15] Opinion of Attorney General Nelson, dealing with the nature of a proceeding under the Extradition Treaty of 1842 with Great Britain, a proceeding which in all essential respects is now codified in § 3184. 4 Op. Att'y Gen. 201, 210-211.

ing "is not a case in law or equity within the scope and meaning of the first clause of the second section of the third article of the constitution of the United States." Or, as reiterated by another Attorney General in 1853,[16] "The judge or magistrate in this case acts by special authority under the act of Congress; no appeal is given from his decision by the act; and he does not exercise any part of what is, technically considered, the judicial power of the United States." Indeed, the respondent Aristeguieta has conceded as much, claiming rather that "the extradition judge [is] a special legislative tribunal charged with a judicial responsibility and possessing judicial powers."[17]

The § 3184 proceeding is thus nothing more than an extrajudicial advisory adjunct to the executive power to extradite, incompatible with the limitations upon judicial power which this Court has drawn from Article III. See *Glidden Company* v. *Zdanok*, 370 U. S. 530, 582; *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113-114; *Hayburn's Case*, 2 Dall. 409.

B. The Attempted Distinction Between Article III Courts and Judges

The nonjudicial advisory function created by § 3184 plainly could not be imposed upon an Article III tribunal, such as the United States District Court for

[16] Opinion of Attorney General Cushing, 6 Op. Att'y Gen. 91, 96.

[17] Petition for certiorari in *Aristeguieta* v. *First National City Bank*, No. 1, Oct. Term, 1962, p. 24. It is further stated therein (pp. 20-21) that the § 3184 proceeding need not be "one within the strict scope of Article III of the Constitution" and that it is enough "to show that the extradition judge has a special judicial responsibility by statute, and hence must be accorded the powers of a statutory tribunal, including the subpoena power."

the Southern District of Florida. *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113-114. But on its surface, § 3184 does not extend its authorization to Article III courts; it speaks only of justices and judges of the United States.[18]

The constitutional problem thus is one of determining whether nonjudicial power, incapable of being exercised by a United States District Court, may nevertheless be granted to or exercised by a judge appointed or assigned to sit on that court. Does Article III of the Constitution permit a distinction, in terms of the limitations on the exercise of the judicial power of the United States, between a federal judge and the constitutional court on which he sits? Can those limitations be avoided simply by designating the judge as the vehicle for exercising non-Article III power?

This Court has not supplied definitive answers to those questions.[19] It has made plain the non-Article

[18] Jurisdiction to act under § 3184 is given to "any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State." Since United States Commissioners and state court judges do not share in the exercise of Article III judicial power, the constitutional issue does not exist as to them. The fact that judges of the United States do exercise Article III judicial power not only distinguishes them from commissioners and state court judges but heightens the constitutional problem when they are called upon to perform nonjudicial functions.

[19] In *Hayburn's Case*, 2 Dall. 409, Chief Justice Jay, Associate Justice Cushing and District Judge Duane, sitting as the Circuit Court for the District of New York, expressed the view that individual judges of the circuit court could render advisory opinions on pension claims against the Government, subject to review by the Secretary of War, by voluntarily agreeing to act as "commissioners" rather than as a court. But that was not a decision by

III nature and hence the non-reviewability of the determinations of an individual judge or commissioner in the extradition-type proceeding.[20] But the issue whether it is constitutionally permissible for a federal judge to engage in such non-judicial activity has never before been squarely posed or resolved.

"Last term this Court indicated that the capacity of an individual judge to participate in an Article III judicial proceeding derives from the constitutional status of the court to which he was appointed. *Glidden Company* v. *Zdanok*, 370 U.S. 530. Implicit in that determination is the concept that, for purposes of Article III, the scope of judicial power and its limitations relate both to Article III tribunals and Article III judges thereof.[21] No indication was given that an

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this Court, as noted in *United States* v. *Ferreira*, 13 How. (54 U.S.) 40, 49. See Hart and Wechsler, The Federal Courts and the Federal System 100-102 (1953). Cf. this Court's determination in *Glidden Company* v. *Zdanok*, 370 U.S. 530, discussed in footnote 22, *infra*.

[20] *In re Metzger*, 5 How. (46 U.S.) 176; *United States* v. *Ferreira*, 13 How. (54 U.S.) 40; *In re Kaine*, 14 How. (55 U.S.) 103; *In re Oteiza y Cortez*, 136 U.S. 330; *Todd* v. *United States*, 158 U.S. 889. The Court of Appeals below noted that these cases "only determine that the jurisdiction of appellate courts has been confined to review of certain orders and judgments of 'courts' and does not extend to review of the extradition 'judge's' findings." Appendix A hereto, p. 9a, *infra*.

[21] In *Glidden*, innumerable references were made to "Article III judges" who had been appointed to Article III courts. See 370 U.S. at 539, 540, 593, 604. While an Article III judge is partially identifiable in terms of his Article III tenure and compensation, he is also so designated only if the court to which he was appointed has Article III status. Thus there is a necessary identity between an Article III court, with its constitutional limitations of power, and the judges composing such a court. And see 28 U.S.C. § 132(b), defining a federal district court as consisting of "the district judge or judges for the district in active service."

individual judge's power could lawfully exceed that of his court, or that he was free to act in nonjudicial matters.[22]

Indeed, the necessary premise of Article III, which underlay the *Glidden* result, is a confinement of the judicial branch of government, whether in the form of courts or judges, to the exercise of the judicial power of the United States. That premise dictates against permitting a legislative grant of nonjudicial power to an Article III judge. To be effective, Article III's prohibition of advisory opinions by constitutional courts must extend to constitutional court judges. Otherwise the restriction could be completely evaded. What Article III precludes a judge from doing in his capacity as the District Court would then be permissible simply by considering him to be an individual officer divorced from his Article III status. Article III limitations on judicial power would be reduced to mere rhetoric. And the constitutional doctrine of separation of powers, whereby "the persons entrusted with power in any one of these [three] branches shall not be permitted to encroach upon the powers confided to the others," *Kilbourn* v. *Thompson*, 103 U.S. 168, 191, would be dissipated.

Particularly is the distinction between court and judge meaningless where, as here, the exercise of the § 3184 nonjudicial function is said by the Government

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[22] In considering the effort by Congress to impose non-Article III advisory functions on the Court of Claims, the opinions of Mr. Justice Harlan and Mr. Justice Clark in *Glidden* viewed that effort as presumptively invalid. 370 U.S. at 582, 587. Thereby rejected was the explanation offered by the Court of Claims in *Sanborn* v. *United States*, 27 Ct. Cls. 485, that these advisory functions were extra-judicial tasks voluntarily undertaken by the judges in the capacity of commissioners.

to be possible only "with all the normal attributes of the judicial machinery, including the subpoena power" and where Congress is said to have intended the judge to use "normal judicial power" and "the accepted judicial modes" in properly performing his duty under § 3184.[23] Judicial machinery, judicial power and judicial modes all connote the machinery, the power and the modes of the entities known to us as courts or tribunals. And if that be true, then it is fair to say that Congress, in using the term "judge of the United States" in § 3184, really referred to a "court of the United States."[24] The constitutional implications of that conclusion need no elaboration.

The attempted distinction, in Article III contemplation, is plainly intolerable. It rests on what has been called a "metaphysical dialectic in which a United

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[23] Memorandum for the United States as Amicus Curiae in support of petition for certiorari, No. 1, Oct. Term, 1962, p. 4.

[24] Many instances may be found where Congress has used the words "judge" and "court" interchangeably and where Congress, in using the word "judge", was found to have invoked the judicial power of the United States as exercisable by federal courts. See instances collected in *In re United States*, 194 U.S. 194, and in *Craig* v. *Hecht*, 263 U.S. 255; cf. *Betts* v. *Brady*, 316 U.S. 455, 458-460.

Where, as here, Congress has sought to impose duties on a District Judge which require him to exercise "all the normal attributes of the judicial machinery," the applicability of Article III is not lost simply because Congress used the word "judge" rather than "court." Put somewhat differently, in the concurring words of Circuit Judge Brown in *Jimenez* v. *Aristeguieta*, 290 F. 2d 106, 108 (C.A. 5), "the only basis upon which Congress by § 3184 may have imposed the duty of conducting the hearing on the person of the Judge is that it is a judicial function calling for the performance of a judicial act." But such a function and such an act, leading as they do to the entry of an advisory opinion, do not qualify as part of the judicial power of the United States within the scope of Article III.

States Judge is something less than a Judge and while performing judicial functions is something different from a District Court."[25] It is that "metaphysical dialectic" upon which § 3184 purports to extend to District Court judges the power to render advisory opinions to the Secretary of State. Therein lies its constitutional defect.

No answer to this constitutional problem is afforded by the description of a federal judge's function under § 3184 as of the character of ordinary preliminary examinations following an arrest for some federal criminal offense.[26] As Mr. Justice Brandeis noted, speaking for the Court in *Collins* v. *Miller*, 252 U. S. 364, 369, commitment proceedings in the usual criminal case before an individual federal judge come "under the court's authority to assume control in the preliminary stages of *matters of which it has the final decision under the law.*" [Emphasis added.]

Extradition proceedings under § 3184, on the other hand, do not relate to matters over which the judge or court has final decision under the law. Rather they are "ancillary to a power in its nature political, created

[25] The quoted words are those of Circuit Judge Brown, rejecting the distinction between a District Judge and a District Court but concurring in the refusal of the Court of Appeals below to entertain an appeal from an interlocutory order of the extradition magistrate in this proceeding. *Jimenez* v. *Aristeguieta*, 290 F. 2d 106 at 108 (C.A. 5). He also added: "The peculiar nature of extradition proceedings and the acknowledged unappealability of the final certification to the Secretary of State does not make the action of this human being who hears the matter solely because he is a Judge an action of some entity other than the Court of which he is an indivisible part."

[26] The proceedings under what is now § 3184 were so described in *Benson* v. *McMahon*, 127 U.S. 457, 463, where a United States Commissioner had presided at the hearing.

not by the constitution, but emanating from the concurrent wills of two independent governments" and "are confined to the ascertainment of facts which can weigh nothing in any consequent and purely judicial investigation of the charge."[27]

A function thus ancillary to a political rather than a judicial power is constitutionally suspect when performed by an Article III judge. To ignore the purpose and the thrust of what the judge does is to ignore the purpose and the thrust of the Article III limitations on the exercise of judicial power. And when judicial power is exercised by a judge solely to aid and advise the Executive Department in the execution of its political extradition power, the Article III limitations take effect. At that point, certainly, Article III can recognize no distinction between court or judge if the limitations are to be effective. Constitutional sanction is therefore lacking for the effort of § 3184 to invest District Judges with jurisdiction to aid in the effectuation of a political power.

C. The Breakdown of Any Court-Judge Distinction in This Case

For purposes of Article III, no valid distinction can be drawn between a District Court and a District Judge. But even if it be conceivable that some fine line of demarcation could be drawn, the line was neither recognized nor followed in this case. No effort was made to preclude the District Court for the Southern District of Florida as such from participation in the § 3184 proceedings.

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[27] Opinion of Attorney General Nelson, 4 Op. Att'y Gen. 201, 210-211 (1843).

On the contrary, from beginning to end, the § 3184 proceeding was marked by an invocation of the powers, the processes and the personnel of the District Court for the Southern District of Florida. The District Court was so completely identified with the proceeding that it now becomes impossible to distinguish this matter, in terms of its pendency before the court, from any of the countless other cases then pending before that tribunal. In every sense, the District Court was called upon to, and did in fact, render an advisory opinion to the Secretary of State contrary to the established principles of Article III.

That such was the true nature of the District Court's participation in this case is evident from the following cumulative factors:

(1) The complaints, pleadings, motions, orders, certifications, briefs, memoranda, and all other papers in the proceeding were headed "In the United States District Court for the Southern District of Florida, Miami Division" and filed with the Clerk of that court. Manuel Aristeguieta was named as the plaintiff and the respondent herein as the defendant. The Clerk, treating the case as he would any other filed in the court, assigned to it a number, No. 9425-M-Civil.[28] In short,

[28] At the opening of the § 3184 hearing before Judge Mathes on September 4, 1959, the following colloquy took place (Tr. 465):

> THE COURT: Now No. 9425, Manuel Aristeguieta against Marcos Perez Jimenez. Is this a civil case?
>
> MR. WARD [for the plaintiff]: Your Honor, this is one of these matters that is very much neither fish nor fowl, but the authority for the proceeding is in Title 18, Criminal Procedures.
>
> THE COURT: We had one out in our district, a proceeding to extradite the former foreign minister of Yugoslavia, Artukovic. That was treated as a criminal matter.

[Footnote cont'd on next page]

as stated on behalf of Manuel Aristeguieta, in his petitions to this Court for writs of certiorari (Nos. 1 and 4, Oct. Term 1962, pp. 3 and 4, respectively), the complaint was filed, and the extradition proceeding was held, "in the United States District Court for the Southern District of Florida."

(2) Nearly all the proceedings were had in one of the regular court rooms, although a few matters were determined in chambers as frequently happens in the ordinary case. No conscious effort was made to confine the hearings to the chambers of any of the District Judges or otherwise to segregate the proceeding from others pending before the court. Cf. *In re Metzger*, 5 How. (46 U.S.) 176, 191, where this Court, holding that the action of the extradition magistrate was unreviewable, emphasized that the extradition proceeding under consideration "was heard and decided by the district judge at his chambers, and not in court."

(3) The complaint, as originally filed and as amended, prayed that "this Honorable Court" issue "its" warrant for arrest and that the defendant be brought before "this Court or Commissioner" for extradition proceedings. Tr. 461.

(4) At least four District Judges, acting in discharge of the duties of the District Court, were assigned to deal with various aspects of the case. They each signed various orders and certifications in their capac-

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MR. WARD: At least the consequences, if nothing else, are criminal in nature.

THE COURT: It is, yes, rather anomolous procedure. I can understand how the clerk would wonder where to put it, but in any event, it is entitled the plaintiff-defendant, and I should think it should be given a criminal number, Mr. Clerk, prepared as a criminal case. [No criminal number was ever given the case.]

ity as "United States District Judge," the same as they do in connection with other matters pending before the District Court.

(5) Judge Mathes, of the Southern District of California, presided over the case only by virtue of his assignment and designation by the Chief Justice to "hold a District Court" in the Southern District of Florida.[29]

(6) Judge Mathes was removed from the case by direction of the Judicial Council of the Fifth Circuit "in order to provide for the effective administration of the business of said district court for the Southern District of Florida." Tr. 2793-2794. This action by the Judicial Council was taken pursuant to its statutory authority to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." 28 U.S.C. § 332. The Council further ordered that the case be assigned to some other judge, as a result of which Chief Judge Whitehurst of the Southern District of Florida assigned the case to himself. Several months elapsed before the hearing in the case resumed, due to "the present condition of the calendars in the Miami Division." Tr. 2902.

(7) The Court of Appeals below described this extradition proceeding as part of "the business of the courts" and the order of reassignment as "a proper exercise" of the Judicial Council's authority conferred by 28 U.S.C. § 332. See Appendix A hereto, p. 9a *infra*. Obviously, had Judge Mathes been conducting the proceeding in any capacity other than as the District

[29] This assignment was made pursuant to 28 U.S.C. § 292(c), permitting an assignment of "a district judge of one circuit for service in another circuit, either in a district court or court of appeals."

Court, the Judicial Council would have had no authority to end his jurisdiction or to seek his reassignment.

(8) During the extradition proceedings, the respondent Aristeguieta sought the aid not only of the District Court for the Southern District of Florida but of the District Court for the Southern District of New York in securing subpoenas and depositions. See petitions for certiorari, Nos. 1 and 4, Oct. Term, 1962. Both the respondent Aristeguieta and the opposing banks sought to invoke the portions of the Judicial Code and the Federal Rules of Civil and Criminal Procedure they deemed relevant. They were thereby attempting, in one way or another, to bring into operation what the Government has described as "all the normal attributes of the judicial machinery, including the subpoena power,"[30] which attributes are those of the District Court rather than of any particular judge thereof considered in isolation.

The totality of these circumstances erases any delimitation of this § 3184 proceeding to one conducted by a magistrate as distinct from the District Court. In all respects, the proceeding was filed in, conducted by and adjudicated in the District Court for the Southern District of Florida, defined by law to consist of "the district . . . judges for the district in active service." 28 U.S.C. § 132(b). Only one of two conclusions is possible:

(a) This case only further demonstrates the lack of any meaningful distinction, for Article III purposes, between a District Court and a District Judge, in which event the advisory jurisdiction of § 3184 may not under

[30] Memorandum for the United States as Amicus Curiae in support of petition for certiorari, No. 1, Oct. Term, 1962, p. 4.

the Constitution be exercised by either the District Court or any judge thereof; or

(b) If any legal distinction can be drawn between a court and a judge, that distinction was completely ignored here and the § 3184 proceeding was in fact conducted by the District Court for the Southern District of Florida. It is too late in the day to rewrite the procedures employed in this case, procedures which led to a certification inconsistent with the constitutional limitations on the exercise of judicial power by federal district courts.

D. The Relationship to the Two Cases Pending Before This Court

In the two related cases now pending on plenary review by this Court, *Aristeguieta* v. *First National City Bank*, Nos. 1 and 4, Oct. Term, 1962, 365 U.S. 840, the following basic question, from which certain subsidiary ones spring, has been accepted for consideration:

> "1. In an extradition proceeding pursuant to the Treaty of Extradition between the United States and Venezuela, 43 Stat. 1698, and pursuant to 18 U.S.C. § 3184, has a United States District Judge conducting the proceeding, or the United States District Court in which he sits, the power to issue a subpoena duces tecum in aid of the proceeding?"[31]

[31] This is the first question presented in the petition for certiorari in No. 1, p. 2. The first question presented in the petition in No. 4, p. 3, is substantially the same except that instead of referring to "the power to issue a subpoena duces tecum in aid of the proceeding" it speaks of "the power to issue compulsory process similar to that provided for in the Federal Rules of Civil Procedure, on the application of the demanding government, in order to secure material and relevant evidence."

Further briefing and oral argument in these two cases have been postponed by this Court to await the filing and consideration of the instant petition. See paragraph 28 of the Statement of the Case herein, *supra*, p. 24. As stated by the respondent Aristeguieta in seeking postponement of further action in those two cases,[32] the premise of the jurisdictional problem here at issue has "a close kinship" and is "so similar" to the principal arguments advanced in Nos. 1 and 4 as to make it appropriate for this Court to await the arrival of this case. The entanglement of the arguments in Nos. 1 and 4 with the basic constitutional problem presented by this petition is at once obvious. The very statement of the quoted question, with its admixture of reference to both the District Judge and the District Court, reflects the complete identity of judge and court which marked the course of the § 3184 proceedings. But more importantly, the resolution of the procedural problems in Nos. 1 and 4 is possible only after the nature of a § 3184 proceeding is determined and the constitutional issue settled. Only if this Court were to hold that a District Judge has the constitutional capacity to conduct a § 3184 proceeding, but that there was some other defect requiring a new hearing, would the procedural problems in Nos. 1 and 4 retain vitality.

If neither the District Court nor a District Judge can constitutionally engage in the advisory jurisdiction of § 3184, however, the questions relating to a judge's power to issue subpoenas or other compulsory process in such a proceeding become moot; questions as to the subpoena power available through a United States

[32] Reply Memorandum of Petitioner Respecting Mootness and Deferral of Consideration, Nos. 1 and 4, Oct. Term, 1962.

Commissioner or a state court judge would have to await another day. To be sure, if a constitutional divide can be found to separate a judge and a court, the complete commingling of the entities in this case might require a new hearing before a segregated judge and the procedural problems would then become meaningful within that narrow frame of reference.

Moreover, the arguments advanced by the petitioners and by the United States in the petitions and memorandum in Nos. 1 and 4 lend convincing weight to the proposition here advanced that, in fact and in the contemplation of Congress, the § 3184 proceeding is designed to invoke the full judicial power of the United States in a manner inconsistent with the dictates of Article III. To refer only to the memorandum of the United States in No. 1, the argument is there made that the § 3184 proceeding is "a legislative creation" with "no exact counterpart in our system of jurisprudence" (p. 7). Congress is said to have "delegated these [fact-finding] functions to the judiciary" and to have decided "to use normal judicial power" in order to effectuate these unique functions (p. 7). The duties thus imposed, it is asserted (p. 4), were intended by Congress "to be performed with all the normal attributes of the judiciary machinery" and of "the accepted judicial modes." Emphasis is also placed (p. 7) upon the alleged applicability of the All-Writs Statute, 28 U.S.C. § 1651, conferring upon "courts" the power to issue all writs necessary or appropriate "in aid of their respective jurisdictions."

A complete invocation of the judicial power of the United States is thus offered in support of the advisory functions of § 3184. These contentions of the Government, repeated by the petitions themselves in Nos. 1

and 4, raise in its baldest form the constitutional problem presented herein. Plainly, the cases need to be considered together.

E. The Great Importance of the Constitutional Issue

Petitioner submits that the constitutional problem posed by this case, as was said by the Government in the related cases,[33] encompasses "general considerations of considerable international importance." If the question presented by the somewhat narrower subpoena problem in Nos. 1 and 4 is of such concern to the responsibility of this Government to honor the stipulations of its extradition treaties, the basic constitutional issue presents even greater international significance. The constitutional capacity of federal judges to advise the Secretary of State in fulfilling extradition commitments under the existing 65 treaties, plus one multilateral treaty, is indeed important in determining how our international commitments can be met.

But the Treaty of Extradition with Venezuela, in its reference to our obligation to use "every legal means" to aid in extradition matters, 43 Stat. 1698, 1705, was not designed to override any means that clearly infringes upon our constitutional separation of functions. And our system of limited powers is too important to bow to any consideration of convenience or ease that may attach to the use of federal judges in extradition matters. Hence, the issue arising under Article III of the Constitution maintains its full and independent significance.

Without exception, this Court has rejected every effort to circumvent or dilute the Article III delinea-

[33] Memorandum of the United States as Amicus Curiae in support of petition for certiorari, No. 1, Oct. Term, 1962, p. 2.

tions as to the exercise of the judicial power of the United States. The plain inconsistency between § 3184 and those delineations warrants the grant of review in this case. The "general rule inherent in the American constitutional system, that ... the judiciary cannot exercise either executive or legislative power," *Springer v. Philippine Islands*, 277 U.S. 189, 201-202, demands further amplification in these circumstances.

II. THE TREATY ISSUE

For the first time in history a government has sought the extradition of a former head of state solely for an alleged abuse of his office occurring during and under his administration of the powers of government.[34] Quite apart from the purely political connotations of that effort,[35] a serious and unresolved problem emerges as to the standard for judging whether such an individual is legally subject to extradition under the terms of the relevant treaty.

In common with all our extradition treaties, Article III of the Treaty of Extradition between the United States and Venezuela expressly precludes extradition "for any crime or offense of a political nature." It further excludes, as a basis for extradition, those "acts connected with such crimes or offenses." The issue here relates to the application of those provisions in the totality of political circumstances in Venezuela.

[34] Cf. *In re Ezeta*, 62 Fed. 972 (N.D. Cal.). *See* Note, *The Trial of Ex-Rulers*, 7 Tulane L. Rev. 279, 285 (1933), stating that it is unlikely that any nation will "surrender to another the refugee ex-chief of the latter for trial, no matter how much the really political charges of treason or rebellion may be disguised superficially with specifications of fraud or some common crime."

[35] The Department of State has acknowledged that this case "has great political importance in Venezuela." Tr. 129.

to an overthrown head of state accused by his political opposition of having committed certain common crimes, to his own financial benefit, during the period of his reign in office.

This Court has wisely refrained from attempting any single formulation of the concept of a political offense or an act connected therewith. Indeed, it has been said that "no uniform criterion exists in regard to this concept so vitally related to the protection of human rights" and that there is "no fundamental agreement among governments and domestic tribunals as to precisely what constitutes a political offense under extradition treaties."[36]

This is a reflection of the ever-changing patterns of polities and revolutions, patterns which permit no rigid or easy characterization. Accepting that fact, judicial and legal authorities have generally rejected the necessity or desirability of a universally applicable description of the political offense. The question whether a particular act can be so categorized, John Bassett Moore once wrote,[37] "is pre-eminently circumstantial." Or, as British Judge Cassels stated,[38] "The words 'offence of a political character' must always be considered according to the circumstances existing at the time when they have to be considered." See also *Karadzole* v. *Artukovic*, 247 F. 2d 198, 202-203 (C.A. 9). Such was also the approach of this Court in *Ornelas* v. *Ruiz*, 161 U.S. 502, 511-512, approving the use by the extradi-

[36] Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 Va. L. Rev. 1226, 1227 (1962).

[37] 1 Moore, Extradition and Interstate Rendition 308 (1891).

[38] *Ex parte Kolczynski*, [1955] 1 Q.B. 540, 549. See also opinion of Lord Denman in *In re Castioni*, [1891] 1 Q.B. 149, 155.

tion commissioner in that case of all the relevant background facts in his resolution of the political crime claim.

In this case, however, no attempt has been made to view the alleged financial crimes against the vast backdrop of political turmoil in Venezuela. The extradition judge simply found that each such crime "was for the private financial benefit of the defendant and is not a crime or offense of a political character or an act or acts connected therewith." Appendix C hereto, p. 38a, *infra*. In ruling that this finding "was based upon the evidence and is not reviewable here," the Court of Appeals viewed the evidence in light of what it apparently conceived to be the solely relevant standard as to political crimes—i.e., whether "the financial crimes charged were committed in the course of and incidentally to a revolutionary uprising or other violent political disturbance." Appendix A hereto, p. 19a, *infra*.

Such a standard may indeed be relevant in other contexts to determine if the evidence shows that the acts of the fugitive occurred as part of a revolutionary movement or violent disturbance against the government then in power. See *Ornelas v. Ruiz*, *supra*; *United States v. Artukovic*, 170 F. Supp. 383, 392 (S.D.Cal.), on remand from this Court, 355 U.S. 393. But this formulation is meaningless in the present situation, involving a far different and more complex set of political circumstances. The flexibility that marks the political offense criterion abjures the limited and irrelevant approach of the court below.

Indeed, so completely political is the situation here that as a matter of law, and therefore of jurisdiction of the extradition magistrate (*In re Ezeta*, 62 Fed. 972,

997 (N.D. Cal.)), there was no alternative but to hold the petitioner non-extradictable by virtue of Article III of the Treaty. At the very least, the situation demands the use of all the relevant background facts in arriving at a more realistic and pertinent formulation of the political offense concept for application in this case. To that end, the following considerations become critical and should have been considered below:

(1) The fact that the alleged financial crimes were found to involve private financial benefit to the petitioner is only the beginning, not the end, of the political offense inquiry. Article III of the Treaty, barring extradition for "acts connected with such [political] crimes or offenses", encompasses the common crimes here involved to the extent that they are linked with political disturbances. Attention must therefore be focused on the degree of connection between the crimes and the political realities.[39] And in interpreting and applying that treaty principle, this Court's dictum in *Grin* v. *Shine*, 187 U.S. 181, 185, is pertinent:

> "Care should doubtless be taken that the treaty be not made a pretext for collecting private debts, wreaking individual malice, or forcing the surrender of political offenders."

[39] At least three fundamental approaches to this problem have been developed: the incidence test of Anglo-American law, the political objective test of French law, and the political motivation test of Swiss law. It has been said that "in marked contrast with the early English law which required a direct relation between the common crime and the political act, the American law seems to have adopted a more liberal attitude by simply requiring any connection, however feeble, between a common crime and a political disturbance." Garcia Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 18 Va. L. Rev. 1226, 1241 (1962).

(2) At the heart of the political inquiry are the historical facts of the long and constant struggle for power in Venezuela between the Betancourt forces and the Jimenez forces. Betancourt's original reign was ended in 1950, when the Jimenez government took over, to be followed in 1958 with a violent revolution restoring Betancourt. Violence, armed outbursts and assassinations marked these years of governmental involutions. And out of those years developed a bitter personal and political enmity between Betancourt and Jimenez. Petitioner Jimenez is viewed by his political opponents as a "corrupt dictator" who exercised absolute and unbridled authority while in power and who was responsible for countless crimes against persons, property and the government.

(3) Among the many charges made against petitioner by the Betancourt government was one that he "stole" the 1952 election and "greatly falsified" the returns so as to be proclaimed Provisional President. This charge was formalized by the Attorney General of Venezuela in 1959 in seeking a warrant of arrest from the Venezuelan Federal Court. But because of its purely political nature, the charge was not included in the extradition request or complaint.[9] It still remains pending before the Venezuelan high court.

(4) The four murder charges included in the extradition complaint were dismissed for lack of sufficient supporting evidence—but not before Judge Whitehurst

[9] In his brief to the court below, at p. 22, the Venezuelan Consul General repeated the charge that in 1952, when the discontented people "voted the wrong way", petitioner Jimenez "stole the election" and "had himself 'chosen' provisional President of the Republic."

discovered that there "was a political overtone" to these charges. Tr. 4305.

(5) The fifteen financial crimes charged to petitioner all arose out of an alleged "abuse of this office" during the years when, as dictatorial head of state, he was "charged with responsibility for the administration of public funds, property and contracting authority" of the Republic of Venezuela. Charges of maladministration and abuse of office, even to the point of pocketing public money, have long been hallmarks of political maneuvers. Particularly is that obvious in the context of the prolonged political contest in Venezuela.[41]

(6) Precisely because these alleged acts occurred while petitioner was the head of state and in supreme charge of the sovereign affairs of Venezuela, charges of maladministration necessarily involve a review and a judgment of the validity of the sovereign acts of Venezuela at a time when that nation was officially recognized by the United States. To trace and determine how official acts of land condemnation were carried out, or how public contracts were made and executed, is to examine into the internal workings of a sovereign government and its numerous agencies. And when that task is undertaken by the courts of another government—even to the limited extent of determining probable cause for extradition purposes—the principle that the validity of the acts of one sovereign state ought not to be re-examined and perhaps condemned by the courts of another becomes highly pertinent.

[41] Judge Whitehurst denied petitioner's motion for leave to take depositions in Venezuela and Europe, which would have developed further the essentially political character of the alleged financial crimes. Tr. 4211-4214. This limitation on the development of the critical political factors may be such as to warrant a new extradition hearing under § 3184.

Oetjen v. Central Leather Co., 246 U.S. 297.[42] But even if the Act of State doctrine be not applied, the essentially political nature of these sovereign acts, and transgressions thereof, must be recognized. Combined with the political mores of a country, maladministration of public affairs may produce one important type of political offense within treaty contemplation.

(7) The fact that the petitioner was granted asylum in the United States because of the dangerous situation in Venezuela deepens the political coloration of the effort to extradite him. See Nixon, Six Crises (1962), p. 211.

Consideration of the foregoing factors permits a realistic formulation of the political offense concept for purposes of this application of Article III of the Treaty. Either (a) the offenses growing out of alleged maladministration of the affairs of government by a former head of a sovereign state recognized by the United States are in themselves political offenses, or (b) such alleged offenses are acts connected with the manifold political crimes and charges leveled by petitioner's political opposition. The underlying mosaic reveals the fundamentally political nature of the extradition claims. They are but the aftermath of a violent upheaval. See *In re Mylonas*, 187 F. Supp. 716 (N.D. Ala.).

In short, the court below erred in holding that a political crime or an act connected therewith must, for treaty purposes, arise out of violent revolutions or

[42] The Act of State doctrine is applicable even though the foreign law may have been violated. "So long as the act is the act of the foreign sovereign, it matters not how grossly the sovereign has transgressed its own laws." *Banco De Espana v. Federal Reserve Bank* 114 F. 2d 438, 444 (C.A. 2).

disturbances against established governments. The underlying situation may also involve the more subtle and discriminatory political practices indulged in by succeeding, antagonistic governmental authorities. Governmental recriminations against those violently ousted from power, charges against them of maladministration of sovereign power and personal pilfering, all coalesce to establish the political nexus.

The political offense principle codified in Article III of the Treaty was meant to be flexible enough to adapt itself to the unique political situation revealed by this case. The failure of the courts below to read and apply Article III of the Treaty in the light of the political facts of Venezuelan life raises issues important to the proper interpretation and application of all our extradition treaties. For that reason, review should be granted.

III. THE PROCEDURAL ISSUES

The remaining procedural issues in this case may be alluded to briefly. They arise mainly because of the uncertainty as to the constitutional capacity of a District Judge or District Court to participate in § 3184 proceedings and because of the resulting inability to categorize the nature of those proceedings.

A. The Assignment Limitations of Judge Mathes

If a United States District Judge, such as Judge Mathes of the Southern District of California, be deemed constitutionally capable of sitting as an extradition magistrate under § 3184, a serious question is posed as to whether he ever acquired jurisdiction in this case.

His last assignment to the Southern District of Florida was for the period ending February 29, 1960

"and for such further time as may be required to complete unfinished business." Tr. 2793. He was further limited, after the expiration of his assignment, by the express provisions of 28 U.S.C. § 296, confining him to the final disposition of matters "submitted to him during such period" of assignment. But on March 9, 1960, without a new assignment being in effect, Judge Mathes permitted the filing of a new second amended complaint, performed the jurisdictional act of issuing a new warrant of arrest, and released petitioner on a new bond. Tr. 835-838. A completely new proceeding was thus instituted, one that cannot be described as the continuation of unfinished business previously pending before Judge Mathes. See *Hrass* v. *Graven*, 257 F. 2d 1, 4 (C.A. 8), certiorari denied, 358 U.S. 835. Indeed, so patently serious is the jurisdictional problem thus created that the Judicial Council, in an effort to minimize possible "doubt as to [Judge Mathes'] jurisdiction or power to act" after the February 29 date, finally ordered his cases in Miami reassigned. See p. 14, *supra*.

The decision in *Frad* v. *Kelly*, 302 U.S. 312, holds void any order of a judge in a new matter that was not part of a case pending before him prior to the expiration of his designated assignment. In this case, after authorizing the filing of a second amended complaint, Judge Mathes ordered the issuance of a new warrant of arrest, accepted all the demanding government's evidence, and ordered that petitioner's motion to dismiss the complaint in light of that evidence be overruled. Such orders cannot stand in light of the decision in *Frad* v. *Kelly* and the express time limitations of the assignment.

B. The Problems Raised By Judge Whitehurst's Participation

Judge Mathes' departure and Judge Whitehurst's entry into the case created additional problems. If Judge Mathes participated in the matter on some basis other than as the District Court, his removal from the case, in the exercise of the administration of the business of the courts, was unwarranted. If he was a mere extradition magistrate, acting as an individual under § 3184, his jurisdiction to continue in the case was unaffected by court business or court assignments. On the other hand, if Judge Mathes was properly removed in the process of administering the business of the courts, Judge Whitehurst's entry into the case poses a new set of questions. Should he have issued a new warrant of arrest, held a new hearing and heard and considered the evidence anew? Was he governed by the Federal Rules of Civil Procedure as asserted in the petitions in Nos. 1 and 4, Oct. Term, 1962? If so, does Rule 63 preclude him from entering a certification based on a transcript of the demanding government's evidence admitted by another judge?[43]

As Judge Mathes himself noted, Tr. 2798, § 3184 plainly contemplates that "the evidence of criminality" be "heard and considered" by the judge or commissioner who issued the warrant of arrest. More pertinently, once a judge has issued a warrant of arrest returnable to himself and has received and heard all

[43] Rule 63, relating to procedure where a judge becomes disabled after a verdict is returned or findings and conclusions filed, "does not [in the absence of consent] authorize a judge in a court action to enter a judgment on the basis of the transcript of the trial before another judge" who is unable to continue. 7 Moore's Federal Practice 1457-1458 (2d ed. 1955). The implication of Rule 63 is that in situations where a verdict has not been returned or findings not yet filed a new trial is required.

of the evidence submitted by the demanding government, as Judge Mathes did in this case, a statutory problem arises as to whether a successor magistrate can make the final certification—particularly where the original magistrate is not incapacitated or not otherwise unavailable. No answer is provided by *Grin v. Shine*, 187 U.S. 181, holding merely that a warrant of arrest issued by a judge may be made returnable before a commissioner or some one else other than the issuing judge.

The situation is complicated by Judge Whitehurst's conceded failure to read all of the evidence submitted by the Venezuelan government relative to the financial crimes. Tr. 4293. Instead he relied upon a fact memorandum applied by counsel for the Venezuelan government, and ignored a memorandum previously submitted by petitioner's counsel. He thus read only one party's analysis of the evidence. In his own words, "No, I haven't read all of the evidence. I simply took the counsel's analysis of the evidence."

Such failure to read the record is particularly significant in a situation where the preceding magistrate may have lacked jurisdiction over the case by virtue of his expired assignment and where that magistrate had passed upon the critical objections and motion addressed to the competency of the demanding government's evidence. The very least that was necessary to cure the defects that attended Judge Mathes' participation was a thorough, first-hand reading of all that was in evidence before him. Only in that way could Judge Whitehurst be sure that, on the basis of what *he* considered to be competent evidence, probable cause had in fact been shown. His duty was to make a judgment based on the competent legal evidence actually

before him, rather than one based on an argumentative lawyer's memorandum. *Fernandez* v. *Phillips*, 268 U.S. 311.

In this context the principle "that one who decides must hear, or in the case of written testimony, read." *N.L.R.B.* v. *Botany Worsted Mills*, 106 F. 2d 263, 265 (C.A. 3), becomes relevant. The full hearing promised by § 3184 means at least that the evidence has been received, read and weighed by the trier of the facts, helped as he may be by subordinates and by briefs and memoranda. See *Morgan* v. *United States*, 298 U.S. 468, 480-481.

The frank admission on the record that he had not read all the evidence in support of the financial crimes overcomes any statement in the certification that Judge Whitehurst based his conclusions "upon consideration of all of the evidence submitted." On that basis alone petitioner was denied a full and fair hearing.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted and the judgment below reversed with directions to release the petitioner on the requested writ of habeas corpus.

Respectfully submitted,

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March 28, 1963.

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19507

MARCOS PEREZ JIMENEZ, *Appellant*,

versus

MANUEL ARISTEGUIETA, *Intervenor-Appellee*,

and

JOHN E. MAGUIRE, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

(December 12, 1962)

Before JONES and BELL, Circuit Judges, and ESTES, District Judge.

ESTES, District Judge: This is an appeal from the judgment of the United States District Court for the Southern District of Florida, Judge Wm. A. McRae, Jr., dated August 23, 1961, dismissing the original and amended petitions for habeas corpus filed by appellant, Marcos Perez Jimenez, and discharging the original and amended orders to show cause issued on the petitions for habeas corpus. The petitions for habeas corpus incorporate by reference the entire file in an international extradition proceeding under 18 U.S.C. § 3184 et seq., filed in the United States District Court for the Southern District of Florida, Miami Division, on August 24, 1959, by Manuel Aristeguieta, Counsel General of the Republic of Venezuela, on behalf of appellee, the Republic of Venezuela (Venezuela), in which the return to Venezuela of appellant, a former president of Venezuela, now in Miami, Florida, is sought under the Treaty

of Extradition between the United States and Venezuela (43 Stat. 1698).[1]

Appellant's amended petition for habeas corpus under 28 U.S.C. § 2241 asserts that the extradition file discloses defects which made unlawful both his commitment to custody and his detention under orders entered therein by Chief Judge George W. Whitehurst of the United States District Court for the Southern District of Florida.

Appellee's return to the order to show cause justified appellant's commitment and detention on the basis of the propriety of Judge Whitehurst's orders, and urged that the extradition file disclosed no defects cognizable upon a petition for writ of habeas corpus.

---

[1] The first warrant of arrest was issued August 24, 1959 by Judge Joseph B. Lieb, who commanded the appellant to be brought before him. The appellant was not brought before Judge Lieb, however, but was brought before Judge Emett C. Choate, who released him on bond on August 25, 1959. A motion to quash the warrant of arrest was brought, not before Judge Lieb, but before Judge William C. Mathes. Judge Mathes held hearings before he quashed Judge Lieb's warrant of arrest on September 24, 1959. On the same day Judge Mathes also issued his own warrant and permitted Venezuela to file an amended complaint "as sworn to on September 11, 1959" in a hearing "before this court . . . and signed in the presence of this court." This complaint attached supporting documents including the order of the Federal Court (now the Supreme Court of Justice) of the Republic of Venezuela for the arrest of appellant and its ruling that there is probable cause to believe the appellant guilty, that Court's determination that extradition of the appellant be sought from the Government of the United States, and copies of correspondence between Venezuela and its representatives, on the one hand, and the State Department of the United States on the other hand, including the request on behalf of Venezuela for the appellant's extradition

On October 21, 1959, Venezuela filed and served on appellant "the original extradition documents" duly authenticated which included charges by the Attorney General of Venezuela, the finding of the highest court of that country that the charges and evidence established cause for prosecution and arrest, the warrant and arrest of that court and a substantial quantity of evidence submitted to that court.

No testimony being offered, after argument of counsel Judge McRae entered the judgment which is the subject of this appeal, holding as a matter of law that the pleadings and papers before him disclosed no cause for issuance of the writ of habeas corpus.

The extradition proceeding was initially heard by Judge William C. Mathes, of the United States District Court for the Southern District of California, sitting in Miami by designation. On March 8, 1960 Judge Mathes permitted the filing of Venezuela's Second Amended Complaint, issued a new warrant for the arrest of appellant returnable "before me", and "with the consent of both plaintiff and defendant" continued appellant's release on bond previously posted. Thereafter the extradition case proceeded before Judge Mathes until Venezuela closed its evidence, all of which was documentary. Appellant's motion to dismiss was denied by Judge Mathes "without prejudice to a renewal of it at the close of the evidence."

In accordance with an order of the Judicial Council of the Fifth Circuit of October 7, 1960, for assignment "to some other judge" of any "unfinished business" of Judge Mathes, Chief Judge Whitehurst ordered the extradition case assigned to himself on March 6, 1961, and proceeded with hearings therein.

The extradition proceeding was concluded by orders entered by Judge Whitehurst, under 18 U.S.C. § 3184, finding that the proof did not establish probable cause on the charges of murder and participation in murder. He further found that probable cause had been shown as to each of the financial crimes which were separately and independently alleged in plaintiff's Second Amended Complaint and that the acts charged constituted crimes named in the specified provisions of the Treaty of Extradition, and he committed the appellant to the custody of the appellee United States Marshal to await the action of the Secretary of State under 18 U.S.C. § 3186. The order of commitment

was entered by Judge Whitehurst on June 16, 1961. His findings and order of certification to the Secretary of State, entered June 23, 1961, attach a copy of the Second Amended Complaint in the extradition proceeding, to which certain sections of the certification order specifically refer.

Venezuela's Second Amended Complaint, upon which the extradition proceeding and orders under attack were based, charged appellant, chief executive of Venezuela (first as a member of a three-man junta, then as provisional President, and later as President), having legal responsibility for the administration of the funds and contracting authority of Venezuela, with two distinct groups of crimes committed in Venezuela during the years 1948-1958, the first group composed of four charges of murder and participation in murder as an accessory before the fact, the second group comprised financial crimes for his own private personal gain. The financial crimes are separately and independently charged in the complaint and are based on certain alleged transactions briefly summarized as follows:

1. The appellant secured commissions or kickbacks in ten specific instances on Venezuelan Government contracts, some of which the appellant himself had executed.

2. Through a "front" or alter ego the appellant secured a portion of the compensation paid by the Venezuelan Government for two tracts of land expropriated by decrees promulgated by him.

3. By his twenty per cent ownership of EVICSA, a construction company, the appellant secured a portion of the compensation paid by the Venezuelan Government on construction contracts with the appellant's Ministry of Development, with the connivance of two of his ministers, one of whom was head of that ministry.

4. The appellant secured improvements on and maintenance of his private, personal estate at public expense at specified times.

The charges of financial crimes allege that the transactions numbered 1 through 4 above make appellant guilty of embezzlement or criminal malversation by a public officer as provided in paragraph 14 of Article II of the Treaty, guilty of fraud or breach of trust as provided in paragraph 20 of Article II of the Treaty, and that the transactions numbered 1 through 3 above make him guilty of receiving money or valuable securities knowing the same to have been unlawfully obtained as provided in paragraph 18 of Article II of the Treaty.

The same charges are pending in the Supreme Court of Justice (formerly the Federal Court), the highest court of Venezuela, upon petition of the Attorney General of Venezuela with a substantial quantity of supporting evidence. The Supreme Court of Justice determined that if the charges are proved they would constitute violations of the penal code of Venezuela and that such charges are crimes specified in the Treaty of Extradition Article II, paragraphs 14, 18 and 20; found that good cause had been shown for prosecution and issued its warrant of arrest. The proceedings before the Supreme Court of Justice, with a substantial amount of evidence from its record—all documentary—were transmitted to the United States through appropriate diplomatic channels. Venezuela invokes these Treaty provisions in its complaint and requisition for surrender of appellant.

Appellant contends that Judge McRae erred in not discharging appellant from custody on the grounds that: (1) Judge Whitehurst did not have jurisdiction to conduct the extradition proceeding, (2) appellant was not accorded due process of law in the proceeding before Judge Whitehurst, sitting as extradition magistrate, (3) the acts for which ap-

pellant's extradition is sought are acts in the exercise of sovereign authority or acts of state the legality of which the judicial authorities of the United States have no authority to determine, (4) failure of the extradition magistrate to determine whether the claim for extradition was for any crime or offense of a political character or for acts connected with such crimes or offenses, (5) the decision of Judge Whitehurst was not based on legal competent and adequate evidence, (6) the alleged financial crimes were not within the Treaty of Extradition, and (7) the extradition magistrate was without jurisdiction by virtue of Article XII of the Treaty of Extradition, inasmuch as the Venezuelan government had failed to lay legal evidence of criminality before the extradition magistrate within the two months prescribed by the Treaty.

I.

Appellant first urges that Judge Whitehurst did not have jurisdiction to conduct the extradition proceeding because the warrant of arrest was made returnable before Judge Mathes—not Judge Whitehurst, contending that the statute (18 U.S.C. § 3184) and the Treaty (Article XII) authorize only that particular justice, judge or commissioner who issues the warrant of arrest or who is "designated in the warrant of arrest" to hear and consider the evidence of criminality. Section 3184 authorizes "any justice or judge of the United States or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any state" upon complaint made under oath, to "issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge or commissioner to the end that the evidence of criminality may be heard and considered."

The Section continues that if on such hearing he deems the evidence sufficient "he shall certify the same, together with a copy of the testimony taken before him, to the Secre-

tary of State". While a literal reading of the language quoted might be susceptible of appellant's contention that only the magistrate issuing the warrant may hear and consider evidence of criminality, this language is equally consistent with a construction which would permit any authorized justice, judge or commissioner to issue a warrant and that the accused may be brought before "such justice, judge or commissioner", meaning *any* justice, judge or commissioner authorized to hear and consider evidence of criminality.

The literal construction urged by appellant has been rejected in *Grin* v. *Shine*, 187 U.S. 181, where a United States District Judge issued a warrant of arrest in extradition making the warrant returnable before a United States Commissioner. The commissioner's jurisdiction was challenged on the ground, among others, that the warrant was required to be made returnable before the judge who issued it. The Supreme Court stated:

> "It may be said that technically the warrant should be made returnable before the magistrate issuing it, but where it is made returnable before another officer, having the same power and jurisdiction to act, we do not think it is fairly open to criticism." (Pp. 187-188)

In *Pettit* v. *Walshe*, 194 U.S. 205, 219, the Supreme Court held it was proper to bring the accused before an authorized commissioner in Indiana to hear and consider evidence of criminality, instead of before the United States Commissioner in New York who issued his warrant of arrest in extradition. This case supports the more reasonable construction of the statute that *any* justice, judge or commissioner authorized to act may hear and determine evidence of criminality, notwithstanding that he is not the same justice, judge or commissioner who issued the warrant of arrest.

Appellant's attempt to limit the holding in *Grin* v. *Shine* to mean only that the warrant may be returnable either before the warrant-issuing magistrate or before another magistrate specifically "designated in the warrant" is not convincing. We think *Grin* and *Pettit* mean that any judicial officer in the class authorized by the statute may hear evidence of criminality after a warrant is issued.

The narrow construction appellant urges would place undue technical burdens of procedure on foreign countries seeking the surrender of fugitives not contemplated by the Treaty which was made

> "to facilitate the course of punitive justice and to limit the crimes which may be committed in their respective territories, . . .
>
> "To deliver up to justice by means of requisition duly made as herein provided any person who may be charged with . . . any of the crimes committed within the jurisdiction of one of the contracting parties and specified in Article II."

Appellant argues that the Judicial Council of the Fifth Circuit was authorized under 28 U.S.C. § 332 only to "administer the business of the courts"; that a "judge" in an extradition case is not a "court" and "the assignment of a judge to an extradition matter does not vest him with jurisdiction" since "jurisdiction is invoked only after a warrant is made returnable to him"; and that Judge Mathes never lost and Judge Whitehurst never acquired jurisdiction in the extradition case.

Appellant cites cases, including collateral proceedings in this extradition case[2] showing that jurisdiction in an

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[2] *Aristeguieta* v. *Jimenez* (5 Cir. 1960), 274 F. 2d 206, cert. granted 365 U.S. 840; *First National Bank of New York* v. *Aristeguieta*, 287 F. 2d 219 (5 Cir. 1960), cert. granted 365 U.S. 840; *Jimenez* v. *Aristeguieta*, 290 F. 2d 106 (5 Cir. 1961).

extradition matter is vested in justices, judges or commissioners, and not "in courts". These cases relate to discovery motions and only determine that the jurisdiction of appellate courts has been confined to review of certain orders and judgments of "courts" and does not extend to review of the extradition "judge's" findings. This extradition proceeding was "the business of the courts" and Judge Whitehurst's assignment to hear the evidence of criminality under the order of the Judicial Council of the Fifth Circuit and Chief Judge Whitehurst's order was a proper exercise of their authority. The reassignment did not constitute any attempt to review any action of Judge Mathes as extradition magistrate. Certainly the office of United States District Judge held by Judge Whitehurst is one that under 18 U.S.C. § 3184 has jurisdiction of extradition proceedings, and he was authorized to act.

Moreover, the orders of Judge Whitehurst of March 23, 1961 and May 2, 1961 ordering that the appellant personally appear before him for the purpose of hearing and considering the evidence, with the Second Amended Complaint actually before him, together with appellant's bond conditioned upon compliance with the orders of the court would satisfy the requirement of a warrant even as construed by appellant in this case since the purpose of the order commanding the accused to appear under 18 U.S.C. § 3184 is "that the evidence of criminality may be heard and considered." Appellant did not object to Judge Whitehurst presiding on this ground until the judge had found against him. The omission complained of provides no ground for release on habeas corpus.[3]

At argument this court *sua sponte* raised the question as to whether the Judge of a United States District Court

[3] *Stamphill* v. *Johnston*, 136 F. 2d 291, 292 (9 Cir. 1943), cert. den. 320 U. S. 1943.

Nor would such an omission be ground for objection on appeal in other types of cases. *Albrecht* v. *United States*, 273 U. S. 1, 8-10 (1927).

established under Section 2 of Article III of the Constitution called "constitutional courts" (*Ex Parte Bakelite Corp.*, 279 U.S. 438, 449; 1 Moore's Federal Practice ¶ 0.4) can be, either authorized or required to perform the functions of an extradition magistrate. Counsel for all parties agree that the constitutional judge may be so authorized. *In re Metzger*, 5 Howard (46 U.S.) 176 (1847) was cited. In that case the Judge acted at the instance of the executive before Congress, in 1848, 9 Stat. 302, made specific provision for a judicial proceeding in extradition. We have been cited to no case in which this question has been raised. We agree that the Judge of a constitutional court may be so authorized. It is unnecessary for us to decide whether such a judge could be required to act as an extradition magistrate.

II.

Appellant's second point urges that Judge McRae erred in restricting his review of the extradition proceedings on habeas corpus to the following: "(1) whether the magistrate had jurisdiction, (2) whether the offense charged is within the Treaty, and (3) whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty"; and in not determining that appellant was denied due process of law in that (1) Judge Whitehurst had not heard, examined, considered and read all of the evidence of criminality as required by Article XII of the Treaty and 18 U.S.C. § 3184, (2) Judge Whitehurst did not examine and consider separately the evidence presented to determine whether in each case there existed probable cause that a crime enumerated within the Treaty had been committed by appellant as charged, and (3) Judge Whitehurst refused appellant's request to take the deposition of Dupouy.

The standard applied by Judge McRae in conducting the habeas corpus hearing was correct. Mr. Justice Holmes in *Fernandez* v. *Phillips*, 268 U.S. 311 at 312 stated:

". . . That writ as has been said very often cannot take the place of writ of error. It is not a means for rehearing what the magistrate already has decided. The alleged fugitive from justice has had his hearing and *habeas corpus* is available only to inquire whether the magistrate had jurisdiction, whether the offence charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty * * *."

All of Venezuela's evidence of criminality was documentary and was presented before Judge Mathes. It was voluminous. All of appellant's evidence (including testimony of witnesses) was presented before Judge Whitehurst. Both sides had, at the request of Judge Mathes and Whitehurst, submitted fact memoranda or analyses of the evidence. On June 16, 1961 Judge Whitehurst announced at the conclusion of extended hearings and arguments before him that probable cause had not been established with respect to the murders, but that probable cause had been established with respect to the financial crimes charged.

While discussing the form of the order of certification and findings to be entered by Judge Whitehurst on June 23, 1961, and after counsel had called to the attention of the court the provisions of paragraph 12 of the proposed order of certification finding that the evidence submitted sustains each of the charges of financial crimes according to the probable cause standard contemplated by 18 U.S.C. § 3184, Judge Whitehurst read the paragraph and stated

"All right. This, in a general way, finds that each of the specifications has been sustained. That is the general findings, that each of these specifications is supported by the evidence."

Then appellant's counsel inquired whether the judge had "read all of the evidence in connection with this?" Judge Whitehurst replied:

> "No, I haven't read all the evidence. I simply took counsel's analysis of the evidence."

From Judge Whitehurst's certification to the Secretary of State that the certification was made by him "upon consideration of all of the evidence submitted, the pleadings of the parties, the arguments of counsel, written and oral, and the orders heretofore entered herein" and other comments of Judge Whitehurst on this occasion and from a realistic view of his conduct of this proceeding we conclude that although he may not have read "all"—in the sense of every word in the enormous record before him, he did read the record and hear, examine and consider the evidence of criminality of appellant as required by the Treaty and the statute.

Appellant's contention that Judge Whitehurst did not examine and consider the evidence presented and determine in each case whether there existed probable cause that a crime was committed by appellant as charged is refuted by the above quoted statement of Judge Whitehurst that "each of those specifications is supported by the evidence" and by his certification to the Secretary of State that the evidence submitted sustains each of the charges of financial crimes separately and independently alleged in Venezuela's Second Amended Complaint according to the probable cause standard contemplated by 18 U.S.C. § 3184 and the Treaty.

In support of his contention that he was denied due process of law in Judge Whitehurst's refusal of his request to take the deposition of Napoleon Dupuoy appellant points to 18 U.S.C. § 3191 which provides that "witnesses" whose evidence is material to his defense may be subpoened on behalf of persons unable to pay the fees of "such witnesses". Section 3191 relates to the subpoening of *wit-*

nesses and *not* to *depositions*. *In re Luis Oteiza y Cortez*, 136 U.S. 330 held that the predecessor statute to Section 3191 "does not apply to documents or depositions offered on the part of the accused" and "that all the provisions of the law and the statute contemplated the production of the defendant's witnesses in person before the magistrate for examination by him." It was held in a collateral discovery proceeding in this case that 18 U.S.C. §3190 permitting the use of properly authenticated *ex parte* depositions presented by the demanding country "are not open to a defendant".[4] The accused is not entitled to introduce evidence which merely goes to his defense but he may offer limited evidence to explain elements in the case against him, since the extradition proceeding is not a trial of the guilt or innocence but of the character of a preliminary examination held before a committing magistrate to determine whether the accused shall be held for trial in another tribunal. *Collins* v. *Loisel*, 259 U.S. 309; *Charlton* v. *Kelly*, 229 U.S. 447. Even if a deposition was available the denial of appellant's belated request for the deposition of Dupuoy would not constitute abuse of the extradition judge's "judicial discretion and his judgment cannot be reviewed upon this proceeding". *In re Luis Oteiza y Cortez*, *supra*.[5] Dupuoy was in the United States. He was a party to the case in New York City opposing Venezuela's effort to secure evidence regarding appellant's funds on deposit in certain banks, and Judge Whitehurst did not deny appellant the right to offer Dupuoy as a witness.

There is no merit to appellant's contention that he was denied due process of law in the extradition proceeding.

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[4] *First National City Bank of New York* v. *Aristeguieta* Footnote 2 supra.

[5] See also *Gallina* v. *Fraser*, 177 F. Supp. 856 (D. Conn. 1959), affirmed 278 F. 2d 77 (CA 2, 1960), cert. den. 364 U. S. 851 (1960).

III.

Appellant contends that the acts with which he is charged are "acts done in the exercise of or in color of his sovereign authority and by virtue of the law of nations as stated in *Underhill* v. *Hernandez*, 168 U.S. 250, was entitled to be discharged from custody inasmuch as the judicial authorities cannot review the acts done by a sovereign in his own territory to determine illegality".[6]

Seizing upon Venezuela's characterization of appellant as a "dictator" he argues that as a "dictator" he himself would be the sovereign—the government of Venezuela—and that all his acts constituting the financial crimes with which he is charged and as to which probable cause of guilt has been found are acts of state or sovereign acts, the legality of which the Act of State Doctrine precludes an extradition judge or magistrate from adjudicating.

Essentially the Act of State Doctrine is "the principle that the conduct of one independent government cannot be

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[6] Appellant relies on Subdivision (c) (4) of 28 U.S.C. § 2241 the habeas corpus statute which provides that the writ shall extend to citizens and domiciliaries of a foreign state "in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations."

This is only a jurisdictional provision conferring no substantive right on appellant to discharge from custody merely upon allegation of jurisdictional facts. *See Horn* v. *Mitchell*, 223 F. 549, affirmed 232 F. 819 (1st Cir. 1916), appeal dismissed 243 U. S. 247.

"The Act of State Doctrine briefly stated, holds that American courts will not pass on the validity of the acts of foreign governments within their own territories . . . this doctrine is one of the conflict of laws rules applied by American courts; it is not itself a rule of International Law." *Banco Nacional de Cuba* v. *Sabbatino*, 307 F. 2d 845, p. 855.

"International law is derived indeed from the customs and usages of civilized nations, but its concepts are subject to generally accepted principles of morality whether most men live by these principles or not." Id., p. 860.

successfully questioned in the courts of another . . ." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303 (1918).

Even though characterized as a dictator, appellant was not himself the sovereign—government—of Venezuela within the Act of State Doctrine. He was chief executive, a public officer, of the sovereign nation of Venezuela. It is only when officials having sovereign authority act in an official capacity that the Act of State Doctrine applies. *Bernstein v. Van Heyghen Freres, S. A.*, 163 F. 2d 246, 249 (2d Cir. 1947), cert. den. 332 U.S. 772 (1947); *Banco de Espana v. Federal Reserve Bank*, 114 F. 2d 438, 444 (2d Cir. 1940).

Appellant's acts constituting the financial crimes of embezzlement or malversation, fraud or breach of trust, and receiving money or valuable securities knowing them to have been unlawfully obtained as to which probable cause of guilt had been shown were not acts of Venezuela sovereignty. Judge Whitehurst found that each of these acts was "for the private financial benefit" of the appellant. They constituted common crimes committed by the Chief of State done in violation of his position and not in pursuance of it. They are as far from being an act of state as rape which appellant concedes would not be an "Act of State".

A policy underlying the Act of State Doctrine is that to adjudicate the validity of an act of a foreign government under its own law in the courts of the United States would "imperil the amicable relations between governments and vex the peace of nations". *Oetjen v. Central Leather Co., supra.*

The judiciary abstains from decision in the ordinary Act of State case in deference to the executive, the branch of government charged with international relations. In a comprehensive and discriminating opinion on the Act of State

Doctrine by Judge Waterman of the Second Circuit, in *Banco Nacional de Cuba* v. *Sabbatino*,[7] it was held that

> ". . . when the executive branch of our government announces that it does not oppose inquiry by American courts into the legality of foreign acts . . . an exception to the judicial abnegation required by the Act of State Doctrine has arisen."

In this extradition case the executive branch, through its representation of the appellee United States Marshal, has manifested its desire that the judiciary act and decide this case on its merits.

Underhill v. *Hernandez* does not support appellant's claim of sovereign immunity. In that case a citizen of the United States brought an action in United States courts for damages for unlawful detention and assault in Venezuela by soldiers in the revolutionary forces in Venezuela, under the command of Hernandez. The Supreme Court held that Hernandez, as a military commander representing a *de facto* government in the prosecution of a war, was not civilly responsible for those acts; pointed out that Hernandez was not "actuated by malice or any personal or private motives"; and made it clear that its decision would have been otherwise had defendant's action been differently motivated, as in the case here. Judge Whitehurst expressly found that the acts of appellant establishing probable cause of guilt of the financial crimes were "for the private financial benefit of the defendant".

The very reason for this extradition case is that the United States has agreed with Venezuela for the extradition of persons charged with crimes enumerated in the Treaty. This Treaty deals expressly in paragraph 14 of Article II with embezzlement or criminal malversation by public officers. Appellant notes that a public officer is one

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[7] 307 F. 2d 845, footnote 6.

who exercises "in part sovereign power".[8] The two governments intended the tribunals to act when the accused is a public officer charged with crimes enumerated in the Treaty. The acts constituting crimes charged for which the extradition of appellant is sought are not "acts of Venezuela" as in *Hernandez*, and the Act of State Doctrine is no bar to this extradition proceeding or justification for the discharge from custody of appellant.

IV.

Even though Judge Whitehurst found that the evidence failed to connect appellant with the murders and that it was unnecessary to determine whether or not these crimes were of a political character, appellant contends that Judge Whitehurst also should have made a finding as to whether the murders were political crimes and found that the murders were political and that the financial crimes were "acts connected with such (political) crimes or offenses" within the meaning of Article III of the Treaty because they were joined in the same complaint with the murders. He argues that the word "claim" in Article III (that "the provisions of this convention shall not import claim of extradition" for political offenses) refers to the extradition complaint and that if any crime or offense contained in the complaint is of a political character or is an act connected with a political crime or offense, the entire "claim" must be denied, notwithstanding the absence of any relationship of the several crimes or offenses with each other. Article III speaks of "*acts* connected with" political crimes and not of "charges" in a legal document. The necessary connection is between such acts or events and other acts or events. It is not the connection affected by charges being in the same legal paper.

Since appellant had no connection with the murders charged in the complaint, those acts could not be political

[8] Appellant's Brief p. 139, Note*

acts or crimes attributable to appellant and whether or not the homicides were political crimes by those who committed them can have no bearing on the appellant.

The murders are no longer in the case.

Judge Whitehurst's decision that the financial crimes were not political was based upon the evidence and is not reviewable here. Cf. *Ornelas* v. *Ruiz*, 161 U.S. 502, 509.

In *In re Ezeta*, 62 F. 972, five separate extradition complaints charging five persons with murder, attempted murder and robbery were heard and considered in one proceeding in which one final order was entered. One defendant, Cienfuegos, was charged with three crimes; two murders and an attempted murder. The extradition magistrate held that the crimes charged, save the attempt to murder, "were all committed during the progress of actual hostilities between the contending forces . . . against the active operations of a revolutionary uprising", *Id.* p. 997, and were therefore political crimes immune from extradition, but the attempted murder occurring before the rebellion, was "free from any political aspect", *Id.* 986, and the magistrate committed Cienfuegos for extradition for the non-political crime of attempted murder.

The fact that there were five separate complaints in *Ezeta* and one in the present case is a difference of form and not of substance.

Nothing in *Karadzole* v. *Artukovic*, 247 F. 2d 198 (C.A. 9, 1957) reversed, 355 U.S. 393, suggests that a finding of whether or not an alleged offense is political must be made when no probable cause of guilt of the offense has been found. This case supports our view that, where several offenses are charged and one or more may be political, extradition may nevertheless follow for those which are not political. The memorandum from the Secretary of State[9]

[9]Part of which appears in the note on p. 94 of Appellant's Brief and all of which is set forth in the Appendix to the Brief of Appellee John E. Maguire.

submitted in the *Artukovic* case expresses the Secretary's opinion that no valid reason exists for not allowing an extradition hearing to take place since it could not "reach the conclusion that *all* of the acts alleged by the Yugoslav government to have been committed by Artukovic are necessarily of a 'political character' merely on the basis of the pleadings" and "that it does not appear on the face of the pleadings that *all* of the offenses which Artukovic is therein alleged to have committed were necessarily connected with such struggle for power." The State Department memorandum comments that while there is a suggestion in the indictment that the acts of Artukovic constituted war crimes, it is nevertheless the opinion of the Department "that some of the murders alleged to have been committed might constitute 'murder within the terms of the extradition Treaty here involved'". Implicit in the Supreme Court's per curiam order vacating the judgment of the Court of Appeals and remanding the case for hearing under 18 U.S.C. § 3184 is a holding that even if *some* crimes charged in a single complaint are political, a hearing that may result in a finding of extraditability shall nevertheless be had under Section 3184, where the complaint may include other crimes that are non-political.

There is no evidence that the financial crimes charged were committed in the course of and incidentally to a revolutionary uprising or other violent political disturbance.

Venezuela seeks the surrender of appellant by the executive officers of the United States (who must ultimately determine whether fugitives shall be surrendered) for trial of appellant on the financial crimes only. The claim of extradition for appellant, within the meaning of the Treaty, is not based on any crime or offense of a political character or on acts connected with such crimes or offenses. Judge McRae did not err in failing to remand the extradition proceedings for further findings.

V.

Judge Whitehurst's finding that the evidence was sufficient to sustain the charges specified, as certified to the Secretary of State, was based upon legal, competent and adequate evidence under 18 U.S.C. Sec. 3190. A *prima facie* case was established by the filing of the charges by the Attorney General of Venezuela, the findings of the highest court of that country that the charges and evidence established cause for prosecution and arrest, the warrant of arrest, and a substantial quantity of evidence submitted to the Supreme Court of Justice of Venezuela. *First National City Bank of New York* v. *Aristeguieta*, 287 F. 2d 219, 227 (2 Cir., 1960), cert. granted 365 U.S. 840.

The record shows that appellant, in November, 1948, was a young lieutenant colonel in the Venezuelan army, of very modest means. By a coup d'etat, appellant and two other lieutenant colonels established a three-man military junta, which was to rule in accordance with the Constitution and laws of Venezuela. As a member of the Junta, the appellant was required by law to file a statement of his assets upon taking office. His sworn statement, filed on March 14, 1949, showed that he and his wife then possessed total net assets equivalent to $31,343.28.

In the succeeding nine years the record discloses that appellant was enriched by more than $13,000,000 in excess of his opening net worth and his legitimate compensation. All during this period the laws of Venezuela prohibited anyone in appellant's position from engaging in commercial transactions with the nation, directly or indirectly. Evidence of Appellant's financial dealings was found in a suitcase which he left behind when he hastily fled Venezuela, on January 23, 1958. The suitcase bore the initials of appellant's wife "F. P. J.," and contained securities, title deeds, banking documents, personal memoranda, currency, and a major general's uniform. That the suitcase and its contents belonged to appellant is clear from a radiogram

sent by appellant's wife from the Dominican Republic, appellant's first stop in his flight from Venezuela, and from a letter he wrote on October 24, 1958, from Miami, Florida.

The record reflects that Dr. Napoleon Dupouy was an intimate and close associate of appellant; that he exerted a strong influence in connection with government contracts; that he reported regularly to appellant and received commissions on government contracts which were shared with appellant. Papers and memoranda in the handwriting of Dupouy and appellant, found in appellant's suitcase, evidence the fact that appellant received commissions or "kickbacks" in the ten specific instances alleged in the second amended complaint.

Dupouy was nominal president of a construction company, Empresas Champenon Bernard de Venezuela, S. A., a subsidiary of the French firm Champenon Bernard. On September 12, 1950, Champenon Bernard entered into a contract with the Venezuelan government for the construction of three viaducts on the Caracas-LaGuaira expressway. Dupouy received as his commission 250,000 bolivares, which the written memorandum reflect that he shared equally with appellant.

On March 18, 1949, the appellant, as Minister of Defense, contracted with the Swedish armaments manufacturer Aktiebolaget Bofors for cannon, guns, parts and ammunition for the amount of $2,358,060. Evidence from appellant's suitcase reflects that he received $58,951.50, which is precisely 2½ per cent of the Bofors contracts.

The memorandum written in Dupouy's hand found in appellant's suitcase evidences that appellant received $19,136.25 on a government contract of June 30, 1950, and $11,983 plus $5902 "to be delivered," totaling $17,885, on a contract of December 15, 1950.

Appellant, as Minister of Defense, on July 24, 1951 contracted with the British firm Vickers-Armstrong (Ship-

builders), Ltd. for the construction of a destroyer, "Aragua," for the amount of Lb. 2,637,000. A memorandum by Dupouy evidences the fact that appellant received $168,979.

In connection with a contract for a ground-to-air communications system for 47 airports in Venezuela with International Standard Electric Company of New York, at a cost of $2,948,754, the evidence shows that appellant received $60,000 through checks from one Virgil C. Applewhite, who was vice-president of a Caracas firm which did preliminary work on the communications contract.

A handwritten memorandum prepared by Dupouy, found in appellant's suitcase, indicated that appellant received $785,000 on the purchase of six destroyers from the Italian firm of Ansaldo, S. A.; $190,272 on a contract for the purchase of three Viscount aircraft, spare parts and spare engines; $258,744 on the purchase of 40 tanks with spare parts and ammunition from two French concerns; and $170,175 on the purchase of boats by the government of Venezuela.

The accountings and memoranda found in appellant's suitcase, in Dupouy's and appellant's own handwriting; and the depositions in the record establish probable cause that appellant unlawfully received commissions or kick-backs through Dr. Napoleon Dupouy in the ten instances alleged in the Second Amended Complaint.

The record shows that appellant, through a close associate, Fortunato Herrera, and a corporation called Polinversiones, received a portion of the compensation paid by the Venezuelan Government for two tracts of land expropriated by decrees promulgated by appellant. One of the transactions involved the property of a Mrs. Carmen Rafaela Agreda de Jiminez, which the government was taking over pursuant to a decree issued by appellant on August 15, 1952. In 1950 Mrs. de Jiminez had offered to sell the property

to the government for B's 8,500,000 and on September 5, 1952 again inquired about compensation for her land. Unable to secure the compensation due her, she gave an option to her attorney, Ascanio, to purchase the property for B's 10,000,000. Ascanio sought out Herrera, who assured him and Mrs. de Jiminez that his friendship with appellant would enable him to solve their problem. The official government appraisal of the property was B's 13,320,210.50. The government paid Mrs. de Jiminez with interest-bearing obligations, and Mrs. de Jiminez turned over the amount in excess of B's 10,000,000 to Herrera.

In the acquisition of land for highway construction Herrera acquired for Polinversiones an option from Industrial del Carton for the purchase of 40,304 square meters of land at B's 30 per square meter. The land was subsequently appraised by the government at B's 120 per square meter. Thus Polinversiones received a profit of B's 3,625,360 in less than a year on an investment of B's 1,209,120. It is clear from the evidence that appellant shared with Herrera in the profits of Polinversiones.

Appellant owned 20% of the stock in a construction company known as Empress Venezuelana de Ingeniera y Construccion, S. A., called by its initials, EVICSA. This company, on an initial capital investment of B's 500,000, earned profits of B's 6,713,223.96 between 1954 and 1958, largely on six government construction contracts.

The record reflects that appellant used on his private estate services of gardners and other workmen on the public payroll and that a government agency drilled a well at appellant's El Penon estate.

The evidence was competent under 18 U.S.C. § 3190, which makes admissible, and therefore competent, documents submitted by the demanding government that satisfy certain specifications. Section 3190 provides that documents authenticated by the demanding government's an-

thorities, so as to be admissible for similar purposes in tribunals of the demanding government, "shall be received and admitted in evidence" at an extradition hearing in this country "for all the purposes of such hearing"; and the certification of the principal United States diplomatic officer in the demanding nation "shall be proof" that the documents are so authenticated.

It has been held by the Supreme Court and the lower federal courts that "competent evidence to establish reasonable ground is not necessarily evidence sufficient to convict, nor only such as can pass technical rules governing the admissibility of evidence in criminal trials." *U. S. ex rel. Klein* v. *Mulligan*, 50 F. 2d 687, 688 (2 Cir. 1931), cert. den., 284 U.S. 665 (1931), and the cases cited therein.

With respect to the evidence upon which the extradition magistrate acted, it must be remembered that the extradition magistrate merely determines probable cause, making an inquiry like that of a committing magistrate and no more. *Benson* v. *McMahon*, 127 U.S. 457, 463 (1888). Probable cause was given its classic definition, on April 1, 1807, by Chief Justice John Marshall, sitting as committing magistrate in the treason prosecution of Aaron Burr. He held that he should not require evidence to convince himself that the defendant was guilty, but only that "furnishing good reason to believe that the crime alleged had been committed by the person charged with having committed it."[19]

The evidence of appellant's enrichment, with no proof of any lawful source of the funds, when considered with the evidence of appellant's transactions with Dupouy, Herrera, Polinversiones, EVICSA, and others is sufficient to warrant the finding that there was reasonable ground to believe the accused guilty of the financial crimes charged.

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[19] *United States* v. *Burr*, 25 Fed. Cas. 2, 12 (No. 14692a) (C.C.D. Va. 1807). Beveridge, *The Life of John Marshall*, Vol. III, p. 376.

VI.

The crimes charged to appellant as to which probable cause has been found are offenses extraditable by Article II of the Treaty of Extradition. The record is clear that these charges are, if proved, crimes in the demanding nation, that question having been determined by the highest court of Venezuela. It is significant in this regard that the charges come here as a result of proceedings before the Supreme Court of Justice of Venezuela.

The crimes as to which probable cause has been shown are within Article II, paragraph 14, of the Treaty—embezzlement or criminal malversation—which provides for the extradition of persons charged with:

> "14. Embezzlement or criminal malversation, committed within the jurisdiction of one of the parties by public officers or depositaries, where the amount embezzled exceeds 200 dollars in the United States of America or B. 1.000 in the United States of Venezuela."

Criminal malversation includes a broad category of corrupt official practices. Webster's New International Dictionary defines the word "malversation" thus: "Evil conduct; fraudulent practices; misbehavior, corruption, or extortion in office." P. 1490 (2d ed. 1957). The Oxford English Dictionary lists two current meanings: "corrupt behaviour in an office, commission, employment, or position of trust"; and "corrupt administration of something"—and gives a number of instances of the use of the word in such broad senses, beginning in 1549 and continuing through the nineteenth century. 6 O.E.D. 94 (1933)

Black's Law Dictionary sets out the accepted definition:

> "In French law, this word is applied to all grave and punishable faults committed in the exercise of a

charge or commission, (office,) such as corruption, exaction, concussion, larceny." P. 1112 (4th ed. 1951).

There is evidence showing that appellant, as chief executive of Venezuela, used his position of power and authority to divert funds and services belonging to Venezuela to his own use and benefit. The offenses as to which probable cause has been certified constituted "embezzlement or criminal malversation."

The crimes as to which probable cause has been shown are within Article II, paragraph 20, of the Treaty—fraud or breach of trust, which provides for extradition of persons charged with:

> "20. Fraud or breach of trust by a bailee, banker, agent, factor, trustee, executor, administrator, guardian, director, or officer of any company or corporation, or by any one in any fiduciary position, where the amount of money or the value of the property misappropriated exceeds 200 dollars in the United States of America or B. 1,000 in the United States of Venezuela."

The phrase "fraud or breach of trust" by an "agent . . . or by any one in any fiduciary position," is very broad and covers the great variety of offenses alleged in this case. As chief executive of Venezuela, appellant was under a duty to supervise the contracting and other financial affairs of the nation as a public trust. The evidence shows that appellant, through arrangements with Dupouy, received a cut on government contracts; through a front man, Fortunato Herrera, engaged in self dealing; through his secret interest in EVISCA, received unlawful gains; and through the use of government labor and services on his private estate, failed to discharge the public trust which was imposed upon him.

Except for the improvements upon appellant's estate, the crimes as to which probable cause has been found are within

Article II, paragraph 18 of the Treaty—receiving—providing for extradition of persons charged with:

> "18. . . . receiving any money, valuable securities or other property knowing the same to have been unlawfully obtained, where the amount of money or the value of the property so . . . received exceeds 200 dollars in the United States of America or B. 1,000 in the United States of Venezuela."

The phrase "receiving any money or valuable securities . . . knowing the same to have been unlawfully obtained" reaches thirteen of the fifteen alleged acts. In the ten Dupouy contract "kick-backs", the two Herrera land frauds, and EVICSA the evidence shows that appellant received money or valuable securities knowing the same to have been unlawfully obtained.

VII.

Appellant contends that the extradition magistrate was without jurisdiction by virtue of Article XII[11] of the Treaty

[11] "Article XII.

> "If when a person accused shall have been arrested in virtue of the mandate or preliminary warrant of arrest, issued by the competent authority as provided in Article XI hereof, and been brought before a judge or a magistrate to the end that the evidence of his or her guilt may be heard and examined as hereinbefore provided, it shall appear that the mandate or preliminary warrant of arrest has been issued in pursuance of a request or declaration received by telegraph from the Government asking for the extradition, it shall be competent to hold the accused for a period not exceeding two months, so that the demanding Government may have opportunity to lay before such judge or magistrate legal evidence of the guilt of the accused, and if at the expiration of said period of two months such legal evidence shall not have been produced before such judge or magistrate, the person arrested shall be released, provided that the examination of the charges preferred against such accused person shall not be actually going on." 43 Stat. 1698, 1705.

because appellee failed to lay befor the extradition magistrate legal evidence of the appellant's guilt within the two months prescribed by the treaty.

The two-month limitation of Article XII of the Treaty is inapplicable, for by its terms the provision relates only to an arrest resulting from a telegraphic request. This extradition case was not initiated by a telegraphic request, but by a sworn complaint filed on August 24, 1959 in the United States District Court. Even if applicable, Article XII was complied with, for the original extradition documents were filed on October 21, 1959, less than two months after appellant was first arrested, on August 25, 1959.

The Second Amended Complaint was filed on March 8, 1960, and a new warrant of arrest was issued and executed the same day. Almost all of the evidence of appellee was on file by April 9, 1960, well within the two-month period. In *Vobshin* v. *Ridenour*, 299 F. 134, 137-38 (5 Cir. 1924), it was held by this court that the period prescribed by a treaty is measured from the date on which the defendant is arrested on the basis of the complaint on which the hearing is held. It is therefore evident that the two-month limitation period of Article XII was not exceeded on either of the two warrants.

The record contains no reversible error and the judgment of the District Court dismissing the appellant's petition for habeas corpus and discharging the orders to show cause issued thereon is hereby AFFIRMED. The mandate of the Court will issue forthwith.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 10,662-M-Civil

MARCOS PEREZ JIMEÑEZ, *Plaintiff*,

v.

THOMAS H. TRENT, United States Marshal, *Defendant*,

and

MANUEL ARISTEGUIETA, *Intervenor*.

AFTERNOON SESSION

August 23, 1961, 4 o'clock p.m.

(Pursuant to adjournment the following proceedings were had:) [Tr. 238-243]

The Court [JUDGE WILLIAM A. MCRAE, JR.]:

Gentlemen, the Court is prepared at this time openly to announce the determinations which have been made in this case.

I have sketched out an order which I shall dictate into the record:

This case came on for hearing before the Court on August 22nd and August 23rd of 1961, on the following pleadings:

Amended Petition for Writ of Habeas Corpus, filed by Marcos Perez Jimenez on July 29, 1961, to inquire into his detention and restraint of liberty by the United States Marshal for the Southern District of Florida.

Order to show cause directed to the said United States Marshal, filed on July 18, 1961.

Answer of said United States Marshal, filed on August 10, 1961.

Answer of Intervenor, Manuel Aristeguieta, Consul General of the Republic of Venezuela, filed on August 10, 1961.

Petitioner's traverse to intervenor's answer, filed on August 16, 1961.

Petitioner's traverse filed August 10, 1961, to the Answer of the United States Marshal to the order to show cause.

On April 13, 1961, the Petitioner, Marcos Perez Jimenez, filed his original petition for habeas corpus on the basis of which an order to show cause was entered on April 13, 1961.

This original petition and original order to show cause were in effect amended and superseded by the amended petition for habeas corpus and the order to show cause issued upon the amended petition.

The Court has given consideration to all of the pleadings and the briefs of the respective parties in the present case, and to the arguments of counsel, which have extended over the better part of two days.

The Court has also given consideration to the evidence which was before the examining magistrate in the case of Manuel Aristeguieta, Consul General of the Republic of Venezuela, plaintiff, against Marcos Perez Jimenez, defendant, in the United States District Court for the Southern District of Florida, Miami Division; being Case No. 9425-Miami-Civil, included the certification of the Secretary of State entered in that case by the Honorable George W. Whitehurst, United States District Judge, on June 23, 1961, together with the exhibits.

In the conclusions and determinations of the Court, as hereinafter specified, the Court considered itself bound by

the general principles relating to habeas corpus proceedings as set forth in the case of Fernandez versus Phillips, 268 (U.S.) 311, and, accordingly, has made inquiry

(1) As to whether the magistrate in said extradition case had jurisdiction

(2) As to whether the offenses charged are within the extradition treaty entered into between the United States of America and the Republic of Venezuela, and

(3) As to whether there was any evidence warranting the finding by the Honorable George W. Whitehurst that there was reasonable ground to believe the accused guilty as determined by him

The Court has likewise given consideration as to whether the continued enlargement on bond of the petitioner, Marcos Perez Jimenez, is proper under the facts which have been made to appear in this case; and such consideration has included the question of whether or not this Court has the power to grant to the petitioner freedom on bail and, if so, whether or not the discretion to grant bail should be exercised

At the conclusion of the arguments, the petitioner, Marcos Perez Jimenez, made oral application for continued enlargement on bail, pending further order of this Court; and the United States Marshal, by and through his attorney, made application that said petitioner be committed to the physical custody of the United States Marshal

Thereupon, upon consideration, it is ordered that

(1) The original petition for habeas corpus, filed herein on April 13, 1961, be and the same hereby is dismissed

(2) The original order to show cause issued herein on April 13, 1961, be and the same hereby is discharged

(3) The amended petition for habeas corpus, filed herein on June 29, 1961, be and the same hereby is dismissed

(4) The order to show cause on said amended petition for habeas corpus, filed herein on July 18, 1961, be and the same hereby is discharged

(5) That the bond presently posted by said petitioner, on the basis of which he is now at large, be and the same hereby is revoked and canceled

(6) The application of petitioner, Marcos Perez Jimenez for continued enlargement on bail be and the same hereby is granted until further order of Court, on the following terms and conditions

(a) That a bond with good and sufficient surety, in the lawful sum of $100,000 be forthwith filed by the petitioner Marcos Perez Jimenez with the Clerk of the United States District Court for the Southern District of Florida, Miami Division, conditioned to provide for the full and prompt compliance with the orders and judgments of this Court; such bond to run to the United States of America and to be approved by the Clerk of said United States District Court.

(b) That said petitioner shall not leave the land area of the County of Dade and State of Florida without the prior written permission of this Court, and that any violation of such condition shall be ground for immediate commitment of said petitioner and immediate revocation of said bond, and that the provisions of the present subparagraph (b) shall be expressly set forth in the said bond

(c) That in making said bond, it is to be understood that the Court expressly approves and does hereby direct that the collateral in the sum of $25,000, presently held by the said Clerk of the United States District Court for the Southern District of Florida, as security for the bond specified by the order entered herein on June 16, 1961 shall be assigned in such manner as may be approved by said Clerk and, after such assignment, such collateral shall be-

comic security, for the new bond required by the present order.

(7) That all motions pending and undisposed of herein which are not expressly dealt with by the present order be and the same hereby are denied.

Done and Ordered in Open Court this 23rd day of August, 1961.

That concludes the Order.

Now, gentlemen, there remains to be disposed of the matter of the record; and counsel and I have likewise given consideration to how that might best be managed.

In other words, we have the problem of certification to the Secretary of State. We have likewise the problem, as I assume, of making a record on appeal.

I would like to hear from counsel with reference to that matter.

Mr. Walters: Your Honor, just for clarification, I presume that your order was directed toward our appeal; and I have prepared a notice of appeal. Continued enlargement pending appeal?

The Court: I did not say "pending appeal."

Mr. Walters: I see.

The Court: I said pending the further order of Court.

Mr. Walters: I see.

The Court: That's right.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 9425-M-Civil

MANUEL ARISTEGUIETA, *Plaintiff*,

v.

MARCOS PEREZ JIMENEZ, *Defendant*.

Order of Commitment

[Tr. 4261-2]

Proceedings herein having been completed subject only to the entry of the final order and it having been determined the evidence is sufficient to sustain certain of the charges under the applicable treaty, it is ORDERED that the defendant is hereby committed to the custody of the United States Marshal to await the action of the Secretary of State under Title 18, United States Code, Section 3186.

It is further ORDERED that the Clerk deliver a certified copy of this Order of Commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

DONE AND ORDERED at Miami, Florida, this 16th day of June, 1961.

GEO. W. WHITEHURST
United States District Judge

CERTIFICATION TO THE SECRETARY OF STATE

[Tr. 4316-4321]

The undersigned United States District Judge, upon consideration of all of the evidence submitted, the pleadings of the parties, the arguments of counsel, written and oral, and the orders heretofore entered herein, certifies to the Secretary of State, in accordance with 18 U.S.C. § 3184,

that he deems the evidence sufficient to sustain the charges hereinafter specified made against the defendant, Marcos Perez Jimenez, under the provisions of the Treaty of Extradition between the United States and the Republic of Venezuela, 43 Stat. 1698.

In support of this determination the following findings and conclusions are entered:

1. This case has been heard pursuant to 18 U.S.C. § 3184 upon the complaint under oath of Manuel Aristeguieta, Consul General of the Republic of Venezuela in Miami, acting on behalf of the Republic of Venezuela, charging the defendant Marcos Perez Jimenez with having committed within the jurisdiction of the Republic of Venezuela crimes provided for by the Treaty of Extradition between the United States and the Republic of Venezuela.

2. The aforesaid complaint upon oath of Manuel Aristeguieta has been amended from time to time, most recently in the Second Amended Complaint for Extradition filed herein on March 8, 1960.

3. A warrant for the apprehension of the aforesaid defendant Marcos Perez Jimenez was issued by the Honorable William C. Mathes, United States District Judge sitting by special designation in the Southern District of Florida, upon the aforesaid Second Amended Complaint. Pursuant thereto the defendant was brought before Judge Mathes, and subsequently the undersigned, to the end that the evidence of criminality might be heard and considered.

4. The defendant was personally present at all times that evidence was received and other proceedings had in this case.

5. All hearings in this case were held on land, publicly, and in a room easily accessible to the public.

6. The evidence of criminality submitted on behalf of the plaintiff consists of exhibits made up of public documents, private documents and transcribed statements of wit-

nesses, in Spanish and English translation, the originals of such papers being certified by the principal United States diplomatic officer resident in Venezuela to be properly and legally authenticated so as to entitle them to be received for similar purposes in the tribunals of Venezuela, in accordance with 18 U.S.C. § 3190.

7. Evidence on behalf of the defendant was received in the form of testimony of witnesses appearing in person, and of a copy of Decree No. 9, dated December 7, 1948, and of exhibits containing affidavits or statements and documents attached thereto, in some cases in Spanish and English translation, which were received pursuant to stipulation or without objection on the ground of their ex parte character.

8. The defendant who was apprehended and brought before the Court is the same person who is charged in the aforesaid Second Amended Complaint with having committed crimes within the jurisdiction of the Republic of Venezuela and who is the subject of criminal proceedings in the Republic of Venezuela refgrred to in such Complaint.

9. The crimes charged in the aforesaid Second Amended Complaint as to which the undersigned has determined that the evidence is sufficient were committed within the jurisdiction of the Republic of Venezuela.

10. Paragraph 15.A of the aforesaid Second Amended Complaint charges that the defendant is guilty of murder and of participation in murder as an accessory before the fact. The evidence submitted herein is insufficient to sustain such charges in that it fails to show the necessary direct connection between the defendant and the commission of such murders.

11. Paragraphs 15.B and 15.C (supplemented by Paragraph 15.D) of the aforesaid Second Amended Complaint set forth charges that the defendant is guilty of certain financial crimes, each such crime being separately and in-

dependently alleged. Each of these crimes is alleged to violate various provisions of the Venezuelan Penal Code, which were specified by the Federal Court of Venezuela in the criminal proceedings in the Republic of Venezuela referred to in such complaint. The allegations, if proved, would also constitute violations of generally similar criminal statutes in the United States. Each one of the crimes alleged constitutes embezzlement or criminal malversation by a public officer, as provided for in paragraph 14 of Article II of the aforesaid Treaty, or constitutes fraud or breach of trust by an agent or by one in a fiduciary position, as provided for in paragraph 20 of Article II of the aforesaid Treaty. Likewise such of those crimes as are specified in Paragraph 15.D (3) of the aforesaid Second Amended Complaint constitute in each case the receipt of money or valuable securities knowing the same to have been unlawfully obtained, as provided for in paragraph 18 of Article II of the aforesaid Treaty. In the case of each alleged crime the amount embezzled, misappropriated or received is more than the minimum amount specified in each of those paragraphs of Article II of such Treaty.

12. The evidence submitted herein sustains each of the charges of financial crimes so alleged, according to the probable cause standard contemplated by 18 U.S.C. § 3184 and Article I of the aforesaid Treaty. The defendant, in the several public offices he held during the period referred to in Paragraphs 15.B, 15.C and 15.D of the aforesaid Second Amended Complaint, was charged with responsibility for the administration of public funds, property and contracting authority in the Government of the Republic of Venezuela; and the evidence shows probable cause to believe that, in his administration thereof, he secured private financial benefit as alleged in such Complaint as to each such crime.

13. Full consideration has been given to the defendant's contention that his extradition is barred by Article III of the aforesaid Treaty, which provides that the provisions

of the Treaty shall not import claim of extradition for any crime or offense of a political character or acts connected therewith, and the following findings are made and conclusions reached:

(a) Upon all the evidence, each of the crimes referred to in Paragraphs 11 and 12 of this Certification was for the private financial benefit of the defendant and is not a crime or offense of a political character or an act or acts connected therewith.

(b) In view of the finding that the evidence is insufficient to sustain the charges of murder and participation in murder as an accessory before the fact, it is not necessary to determine whether such crimes or offenses are of a political character or are acts connected with crimes of offenses of a political character.

(c) A finding that the alleged murders and participation in murders as an accessory before the fact were crimes or offenses of a political character or acts connected therewith would not affect the wholly separate crimes referred to in Paragraphs 11 and 12 of this Certification. *Karadzole* v. *Artukovic*, 355 U.S. 393 (1958); In re *Ezeta*, 62 Fed. 972 (N.D. Cal. 1894).

14. There is attached to this Certification a true copy of the Second Amended Complaint for Extradition referred to herein.

15. The Clerk is directed to transmit this Certification to the Secretary of State forthwith.

The undersigned, in anticipation of this Certification, has hitherto on June 16, 1961, issued his order in the nature of a warrant, pursuant to 18 U.S.C. § 3184, committing the defendant to the custody of the United States Marshal to await action by the Secretary of State.

By separate order of this date the undersigned is certifying to the Secretary of State, in accordance with 18 U.S.C. § 3184, the evidence received in this case.

Let a signed copy of this Certification be entered in the record of this proceeding to serve as the final order herein.

DONE AND ORDERED at Miami, Florida, this 23rd day of June, 1961.

/s/ GEO. W. WHITEHURST
George W. Whitehurst
United States District Judge

CERTIFICATION OF EVIDENCE TO THE SECRETARY OF STATE

[Tr. 4321-2]

(Number and title omitted) (Filed:)

The undersigned United States District Judge hereby certifies to the Secretary of State that all the evidence received herein (including all the testimony taken before him) is included in the record in this proceeding. Such evidence consists of Decree No. 9, dated December 7, 1948, which was received in evidence by stipulation; the documents marked as Plaintiff's Exhibits 1, 1-A, 2, 3, 4, 4-A, 5, 6, 7, 8, 9, 10, 11, 12, 12-A, 14 (except that it is noted that the defendant's motion to strike pages 80-89 and 80-E—87-E of such Exhibit 14 was granted), and 15; Defendant's Exhibits 1 through 5; and the transcripts of hearing of April 24, 25 and 26, 1961.

The Clerk is directed to transmit this certification to the Secretary of State and to transmit to him the entire record in this proceeding. Let a signed copy of this Certification be entered in the record of this proceeding.

DONE AND ORDERED at Miami, Florida, this 23rd day of June, 1961.

/s/ GEO. W. WHITEHURST
George W. Whitehurst
United States District Judge